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47363

UNITED STATES RUBBER COMPANY,  
a corporation,

Appellee,

v.

CAP-ALL TIRES, INC., a corpora-  
tion,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

19 I.A.<sup>2d</sup> 218

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MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order in the Municipal Court of Chicago sustaining the motion of the plaintiff to strike the defense and counterclaim and entering a default judgment against the defendant in the sum of \$1800 and costs. This issue, of course, is to be determined solely upon the propriety of the court's order in striking the tendered defense and counterclaim, for if the defense tendered was a good defense the defendant was not in default and the judgment should not have been entered and a jury trial should be had in accordance with the demand shown in the record.

The statement of claim was filed on March 1, 1957. On March 14, 1957 a default judgment was entered against the defendant for failure to appear, in the amount of \$1800 and costs. On March 18, 1957 the judgment was vacated and defendant given leave to appear and ordered to answer in ten days.

On April 18, 1957 the defendant was ordered to answer within ten days, and a substitution of attorneys was allowed.

On May 10, 1957 a motion was made by the plaintiff for the entry of a default judgment for the failure to file an

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affidavit of merits. That motion was entered and was continued from <sup>time</sup> to time thereafter. On at least one occasion, May 17, 1957, a defense and counterclaim were filed and were stricken on the plaintiff's motion, and the motion for default judgment was continued.

On June 5, 1957 the motion for default judgment came on again and the defendant tendered the defense and counterclaim which are here in issue. After the court had indicated its intention to strike the defense and the counterclaim and to enter a default judgment in favor of the plaintiff, the defendant did not ask leave to file an amended defense or counterclaim but indicated that it intended to appeal and stand upon the defense tendered that day. Then the attorney for the plaintiff indulged in remarks as to why he wanted the judgment entered--presenting to the court things that were entirely beyond the scope of the litigation and went to the defendant's dealings with third parties and the financial condition of the defendant's affairs. The defendant on this appeal differs with the ruling of the trial court as to the sufficiency of the defense filed, but urges that, if insufficient, the court should have granted it leave to file another defense, and that the remarks of plaintiff's counsel were so prejudicial that they deprived it of a fair trial.

In Wilson v. Tromly, 336 Ill. App. 403, 410, the court said: "While the trial court should be liberal in the allowance of proper amendments, this does not require that a party be permitted repeatedly to file pleadings which do not serve to cure the defect upon which the court has ruled." A party is



not entitled as a matter of right to file an amended pleading. Aaron v. Dausch, 313 Ill. App. 524. Under the circumstances existing in this case it would certainly have been no abuse of discretion for the court to have refused to allow the defendant an opportunity to file an additional defense, even if the defendant had asked for that privilege. Likewise, while the remarks of plaintiff's counsel were not discreet and such collateral matters should not properly be presented to the court where it might be considered as an attempt to influence or prejudice the court, still the remarks were made after the court had already indicated its decision in the matter and could not have possibly prejudiced the right of the defendant to a fair disposition of the motion. Both the failure to allow additional defenses to be filed and the comments of counsel are urged by the defendant as grounds for reversal, but they are so trivial that their urging merits little or no consideration.

There remains for consideration whether the defense tendered and the counterclaim set up questions of fact which, if they had been proved, would have been a defense to the plaintiff's statement of claim.

The statement of claim sets up that the plaintiff sold and delivered to defendant certain goods, wares and merchandise at the special instance and request of the defendant, and sets forth that such merchandise was sold and delivered at various dates: that is, April 10, April 17, two deliveries April 20, and May 9, 1956, and that the total value of the merchandise so delivered was \$2615.16, and sets up that certain payments were made on





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account of those deliveries on July 23, April 23, September 25 and October 26, and that those total payments amounted to \$815.16, and that there was a balance of \$1800 due and that the plaintiff had requested the payment of the balance and defendant had failed and refused to do it.

The defense tendered in court on June 5th, the sufficiency of which is here under consideration, admitted the purchase of the goods as listed by the plaintiff's claim. It specifically admits the receipt of the goods on April 10th and April 17th and states that it has paid said invoices. Defendant admits the receipt of the goods described in the deliveries of April 20, 1956, but denies that it is indebted to the plaintiff therefor. It states that it ordered Gillette Truck & Bus Synthetic for recapping tires, and that on April 20, 1956 plaintiff delivered Gillette Super Tread Synthetic instead. The defendant then alleged that it advised plaintiff that the merchandise was contrary to order and that defendant did not believe it fit for the purpose intended, and requested the merchandise be picked up by plaintiff. It then alleges that the plaintiff thereupon represented to defendant that the merchandise was fit for the use and purpose intended. It then alleged that, relying on said representations of the plaintiff, it proceeded to use the merchandise, accepted after this assurance, for recapping tires, and that immediately, on May 22, 1956, defendant received complaints from its customers relating to the tires recapped with the aforesaid rubber. It then alleged that it could not ascertain immediately

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upon using said merchandise as to whether or not it was fit for the purpose intended, as represented by the plaintiff. It then alleged that on the next shipment, that of May 9, 1956 listed in the plaintiff's statement of claim, the merchandise delivered was in accordance with the order: that is, Gillette Truck & Bus Synthetic. It then alleged that as a result of said inferior merchandise, from May 22, 1956 to October 31, 1956, it was compelled to make adjustments and replacements with its customers, and that the damage suffered by the defendant in such replacements and adjustments amounted to \$2100, and that the defendant is not indebted to the plaintiff for any sum of money whatsoever.

As to defendant's answer to the first two invoices alleged as sold in the statement of claim, that it has been paid--that is a matter of fact to be determined by evidence. That, of course, is not inconsistent with the statement of claim setting forth the making of certain payments by the defendant. It may be, as suggested in plaintiff's brief, that the defendant is relying upon the well established custom that in the absence of direction the first moneys received should be applied to payment of the first goods received. Sprague, Warner & Co. v. Hazenwinkle, 53 Ill. 419. But the amounts of those two invoices do not coincide with the payments made, and there is no doubt that the statement that those two invoices were paid, clearly advises the plaintiff of the defense which it will have to meet.

As to the goods delivered on April 20th, since this allegation is clearly that defendant rejected the tendered goods as not being what it had ordered; that it was induced to accept the goods by



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plaintiff's statement that they were suitable for the purpose for which the goods were ordered, and that it did accept them and that it did use them and that complaints were made by its customers when such substituted material was used, this brings us to the definition of express warranty as contained in the Sales Act. (Ill. Rev. Stats. 1957, chap. 122-1/2, par. 12.)

"Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty."

The remedies for breach of warranty are set forth in section 69 of the Sales Act.

"(1) Where there is a breach of warranty by the seller, the buyer may, at his election--

(a) Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price.

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(6) The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from a breach of warranty."

It is clear that the defense advised the plaintiff of the alleged warranty charged, of its breach, and of the damages resulting therefrom. Section 42 (2) of the Civil Practice Act (Ill. Rev. Stats. 1957, chap. 110) sets forth the requirements in regard to the sufficiency of pleadings:

"No pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he is called upon to meet."



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In Norton v. Cook, 14 Ill. App.2d 390, in discussing the sufficiency of pleadings, the court said:

"All that is necessary in the statement of a plaintiff's claim in a declaration is a clear and concise statement, couched in simple language of sufficient ultimate facts to show a liability on the part of defendant to the plaintiff. Lincoln Park Coal & Brick Co. v. Wabash Ry. Co., 338 Ill. 82; Lasko v. Meier, 394 Ill. 71. In the case of Parrino v. Landon, 8 Ill.2d 468, it was said: 'Our decisions in Wagner v. Kepler, 411 Ill. 368, and Gustafson v. Consumers Sales Agency, Inc., 414 Ill. 235, although containing factual differences, reflect the recent trend of all courts to make form inferior to substance. We believe both justice and reason command the conclusion that such pleading as gives enough information to indicate a ground for liability is sufficient to support a judgment.' The case of Warnes v. Champaign County Seed Co., 5 Ill. App.2d 151, lays down the rule that 'the primal object in pleading is to produce an issue affirmed on one side and denied on the other and the trial is had to determine the issue thus made.'"

And recently, in Parrino v. Landon, 8 Ill.2d 468, 470, the court said:

"The prime purpose of pleading must never be hidden in a morass of technicalities. Pleading must inform and notify both adversary and court of the charges and defenses of the pleader. The desire to avoid extremes does not give license to mislead. Courts must look to substance and apply basic rules of other fields of the law when deemed necessary."

It would therefore appear that under the rules in regard to pleadings, the defense sufficiently advised plaintiff that as to the goods furnished on April 20, 1956, first, it was not in accordance with the order; secondly, that the defendant did not use it; thirdly, that defendant told plaintiff to pick



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it up; fourthly, that plaintiff represented that the merchandise was fit for the use and purpose intended, that defendant relied upon that representation and used the material furnished, and that when said material was used it was not satisfactory for the purpose for which it was to be used and that by virtue of the unsatisfactory nature of the inferior merchandise the defendant was damaged and that it did not owe any money for the goods shipped on April 20th.

The defense tendered by the defendant on June 5, 1957, was sufficient under the statutes and decisions of the courts of Illinois and should not have been stricken. The counterclaim raises the same questions of fact as are raised by the defense, and it should not have been stricken. The order striking the defense and counterclaim is reversed, and the cause is remanded for further proceedings in accordance with the opinion herein expressed.

REVERSED AND REMANDED.

FRIEND, P. J., CONCURS.

BURKE, J., DISSENTS.

ABSTRACT ONLY.

OVER.



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The defense tendered by the defendant on June 5, 1957 was sufficient under the statutes and the decisions of the courts of Illinois and should not have been stricken. The order striking the defense is reversed and the cause is remanded for further proceedings in accordance with the opinion herein expressed.

REVERSED AND REMANDED.

FRIEND, P. J., CONCURS.

BURKE, J., DISSENTS.

ABSTRACT ONLY.

OVER.



BURKE, J., DISSENTING:

The amended answer does not state a defense to the plaintiff's statement of claim. The amended counterclaim does not state a cause of action. The defendant had been given ample opportunity to file an adequate pleading. The fact that it was unable to do so strongly indicates that it has no defense to the claim. The defendant says that he paid two invoices but neglects to state the amounts or the dates of the payments or in what manner the payments were made. The statement of account filed by the plaintiff gives defendant credit for four cash payments, giving specific dates and amounts.

The hearsay statement pleaded by the defendant is neither a positive statement of ultimate fact nor a statement on information and belief. It does not state as a fact what was wrong with the treads or with the recapped tires. The advice of customers that the recapped tires had deteriorated and caused separation could have been predicated on other causes, not the fault of the treading sold by the plaintiff or related to the suitability of the treads for the purpose. Nowhere else in the answer is there any information as to what, if anything, was wrong with the treads. The only damage which the defendant alleges is that it was obligated to make adjustments and replacements with its customers and subsequently lost a number of customers due to the inferior quality of the merchandise. The adjustments and replacements made between the defendant and its customers





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could not be charged to plaintiff.

The pleading alleges that the treads "were represented to be fit for the use and purpose intended" but were not so fit. There is no averment as to what use and purpose was "intended." Defendant's pleading does not say what use was made of the treads. The defendant, knowing the grade of treads it had received, elected to keep them. There is no allegation that there was anything wrong with the treads or wherein the treads were not as warranted. It will be observed that the defendant ordered and there was delivered to it some quantities of "Gillette Truck and Bus Syn." at .3783 a pound and separate quantities of "Gillette Super Tread Syn." at .3414 a pound. In my opinion the court was right in striking the amended answer and counterclaim and in entering judgment for the plaintiff.



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PEOPLE OF THE STATE OF ILLINOIS  
ex rel, CARL RELI,

Appellee,

v.

JOSEPH F. BOWDISH, LEONARD LARSEN,  
ALBERT CANNELLA, GEORGE UHL and  
EDWIN DAVIS,

Appellants.

INTERLOCUTORY APPEAL

FROM SUPERIOR COURT

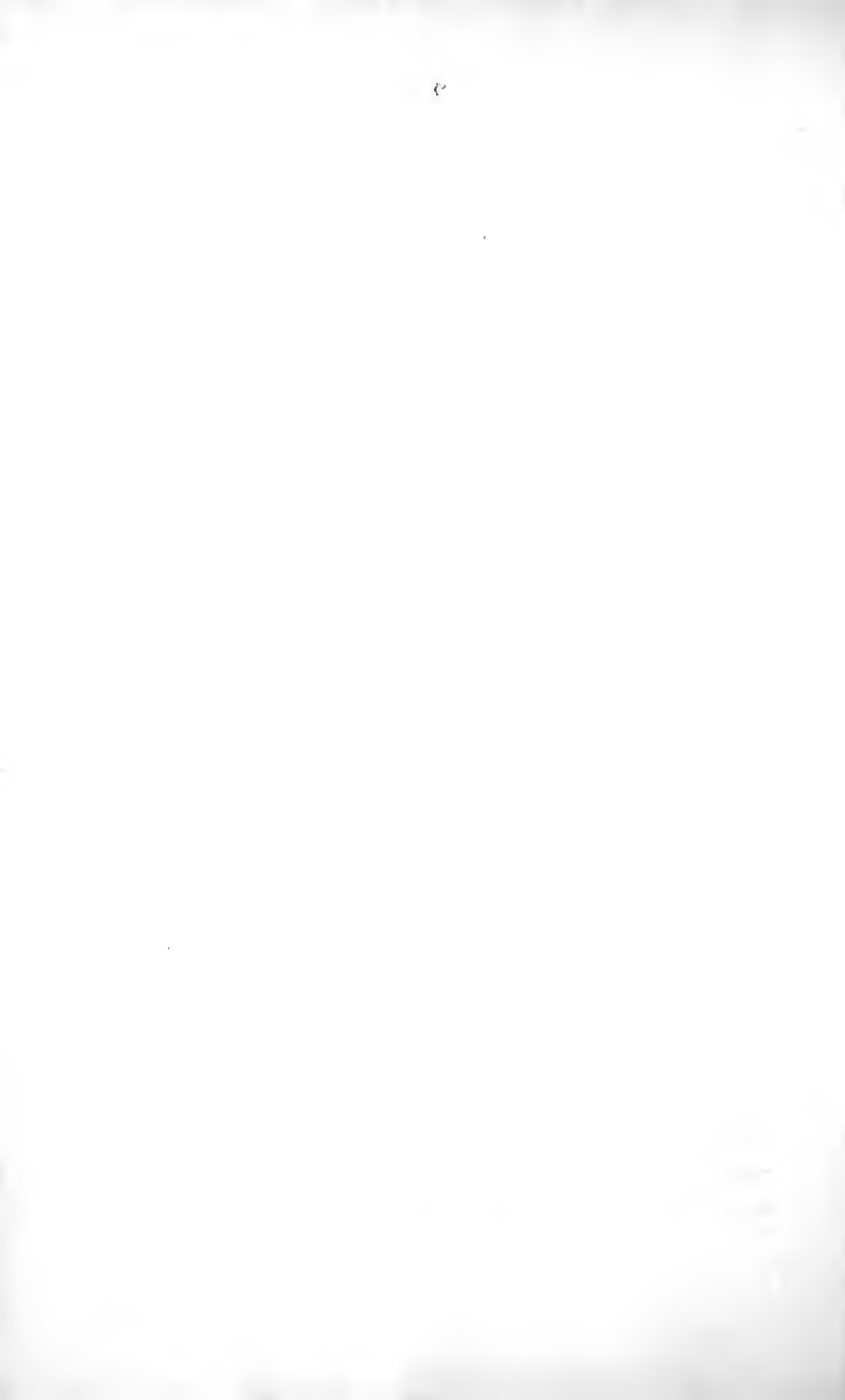
COOK COUNTY

19 I.A.<sup>21</sup> 219

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order granting a temporary injunction entered on December 21, 1957 without notice and without bond in the Superior Court of Cook County.

The petition in the Superior Court of Cook County is for a temporary injunction and prays for no other relief. Temporary injunctions are issued only for the purpose of maintaining the status quo until a hearing is had and the case is disposed of on its merits. 21 I. L. P. Injunctions, sec. 4, p. 522. From their very nature such injunctions are auxiliary and dependent on the allegation of grounds for relief and the request therefor. It is of course not proper to dispose of the final relief requested on a hearing in regard to a temporary injunction, but there must be some final relief requested. In Schuler v. Wolf, 372 Ill. 386, at p. 389, the court pointed out these two considerations as follows:



"There is a marked distinction between the issue presented on an application for a temporary injunction, or on a motion to dissolve such, and the one where the cause is being heard on the merits. On the application for a temporary injunction, or a motion to dissolve, it is only necessary that the party in whose favor the restraining order is sought show, in the statement of his case on the merits, that he raises a fair question as to the existence of his rights. He must claim and satisfactorily show to the court that the matter out of which his asserted rights arise should be preserved and held in statu quo until the cause can be disposed of on its merits."

And Mr. Justice Burke stated the proposition in Biehn v. Tess, 340 Ill. App. 140, at p. 145, as follows: "However, if it appears from the face of the complaint that there is no equity in it and no sufficient grounds are disclosed therein why the court should interfere, it is error to grant a temporary injunction."

If it should be urged that the facts alleged in the petition warranted permanent equitable relief although the prayer was only for temporary relief, the facts alleged indicate that the controversy relates to who is the proper Chief of Police of the Village of Markham--the plaintiff, appointed by the Mayor on a 30-day term, or the defendant Bowdish, appointed by the Board of Trustees of the village. It is a general rule that equity will not take jurisdiction of political controversies and that disputed questions concerning the appointment of civil officers and their right to hold office as such are of a nature purely legal and cognizable only by courts of law. In a case similar to the instant one on the facts, this court dissolved an injunction and held it improvidently issued. Michels v. McCarty, 196 Ill. App. 493; 21 I. L. P. Injunctions, sec. 76.



This injunction was issued without notice and without bond. The pleadings set forth no emergency that would have warranted the court to grant the injunction without notice. Section 3 of the Injunctions Act (Ill. Rev. Stats. 1957, chap. 69) is as follows:

"No court or judge shall grant an injunction without previous notice of the time and place of the application having been given to the defendants to be affected thereby, or such of them as can conveniently be served, unless it appears, from the complaint or affidavit accompanying the same, that the rights of the plaintiff will be unduly prejudiced if the injunction is not issued immediately or without notice."

This court in Skarpinski v. Veterans of Foreign Wars, 343 Ill. App. 271, at p. 275, said:

"In the last analysis, to test the necessity for the issuance of an injunction without notice, the court must ask whether in the minutes or hours required to procure a defendant's appearance, defendant could and would do that which would seriously obstruct the court's power to deal justly and effectively with the issue in dispute."

This test was cited with approval in Mitchell v. Mitchell, 10 Ill. App.2d 437, and American Dixie Shops, Inc. v. Springfield Lords, Inc., 8 Ill. App.2d 129. Allegations that confusion exists in the Police Department of the village are not grounds to bring the plaintiff's rights into question in a way to meet the test. The order of the court makes no findings that the rights of the plaintiff would be unduly prejudiced unless the order was entered without notice, nor shows good cause why the bond should be waived.

It is clear that the petition does not ask for permanent equitable relief, that the proper remedy to test the right to





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public office is not equitable and that no grounds were alleged which would warrant any relief to be granted without notice or bond.

The order entered December 21, 1957 granting the temporary injunction is reversed.

REVERSED.

FRIEND, P. J., and BURKE, J., CONCUR.

ABSTRACT ONLY.



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47292

JOHN A. AMOS,

Appellant,

v.

ARTHUR A. HELWIG,

Appellee.

APPEAL FROM SUPERIOR COURT,  
COOK COUNTY.

19 I.A. 220<sup>1</sup>

MR. PRESIDING JUSTICE McCORMICK DELIVERED  
THE OPINION OF THE COURT.

John A. Amos, hereafter referred to as the plaintiff, brought an action for specific performance of an oral agreement which he claimed had been entered into between him and Arthur A. Helwig, hereafter referred to as the defendant. The case was referred to a master in chancery who, after hearing, filed a report and supplemental report adverse to the plaintiff. Objections to the report were filed and, standing as exceptions, were overruled by the trial court which entered a judgment on April 29, 1957 approving the master's report and supplemental report and dismissing the complaint, as amended, for want of equity, from which judgment the present appeal is taken.

There was a protracted hearing before the master. We have before us a record consisting of 1499 pages, and the plaintiff's abstract consists of 392 pages, together with a supplemental abstract filed by the defendant of 11 pages. The master's report takes up over 66 pages of the abstract and over 126 pages in the record, and the master subsequently filed a supplemental report. The evidence was in sharp conflict.

It appears from the record that the plaintiff and defendant had been engaged in the railway supply business for a number of years. The customers of this business are railroad companies.



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The plaintiff and defendant first met in 1920 and they had some business connection around 1932. The plaintiff was employed by the Pyle-National Company, finally becoming president. The plaintiff and defendant started a company which, after certain changes of name, became the Ajax Consolidated Company. The plaintiff, during the time that he was with the Pyle-National Company and after the founding of the company which became the Ajax Consolidated Company, had a great deal to do with the operation of the Ajax Consolidated Company and its predecessors. The record is rife with innuendoes that companies and persons engaged in the business in which both plaintiff and defendant were active made various payments to the representatives of the railroad companies in order to secure their business.

In 1947 the plaintiff owned 10,900 shares of stock out of a total of 20,000 outstanding of the stock of Ajax Consolidated Company. In March, 1947 an indictment was returned against the plaintiff growing out of his connection with Pyle-National Company, and in June, 1947, after trial, he was acquitted. At that time the plaintiff was indebted to the Continental Illinois National Bank and Trust Company on a note. It is the contention of the plaintiff that both the representatives of the railroad companies and the defendant were very much concerned lest the plaintiff talk and reveal some of the peculiar transactions which seemed to have become the common practice in the industry. The plaintiff had various conversations with the defendant after the return of the indictment, and the defendant loaned the plaintiff at or about that time \$15,000, which was repaid. The defendant had

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several times made loans to the plaintiff which had always been repaid. After the acquittal the plaintiff had many conversations with the defendant and he sold to the defendant 6,000 shares of the stock in Ajax Consolidated Company (which after the split-up became 60,000 shares) for \$58,000. The plaintiff applied the money to his indebtedness with the Continental Illinois National Bank and Trust Company.

The dispute herein arises with reference to these 6,000 shares of stock. It is the contention of the defendant that the sale was an outright sale to him. On the other hand the plaintiff contends that at the time of the sale he had discussed with the defendant and arrived at an understanding with him as to how he, the plaintiff, could be protected with reference to his job at Ajax Consolidated. After leaving the Pyle-National Company the plaintiff had become president of Ajax. The plaintiff testified that at the time of the sale of the stock to the defendant the defendant agreed that as long as he and his wife lived the plaintiff would have the right to nominate anyone to repurchase the stock from the defendant at the same price, and the reason for this agreement was to provide security for the plaintiff in his job. The agreement was for an indefinite period. The plaintiff's testimony is that his purpose in retaining the right to nominate was that he could nominate persons to purchase the stock who would be friendly to him and who would vote it in his favor, thus giving him more security in his position with the company. The defendant denies any such agreement. Both the plaintiff and his former attorney testified that at a meeting with the defendant the defendant

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stated to them that there was such an agreement and that the terms were in accord with the plaintiff's contentions.

At or about the time of the sale of the 6,000 shares to the defendant the plaintiff sold 1,000 shares to members of his then attorney's family for \$8.00 a share, without any reservation of a right to have a nominee repurchase the stock. In October of 1947 Pyle-National Company had filed a civil suit against the plaintiff growing out of the same claims which were involved in the criminal case. This action was subsequently settled by the plaintiff for \$70,000. At the time of the negotiations between the parties the attorney representing Pyle-National Company asked for an affidavit from the plaintiff with reference to his assets, and he asked for a second affidavit with reference to the plaintiff's holdings in the stock of Ajax Consolidated Company. The second affidavit contained this statement: "Further affiant says he does not now own directly or indirectly any stock in the Ajax Consolidated Company," and there was a second paragraph to the effect that the plaintiff had not transferred to his wife any stocks, and that the settlement entered into was contingent upon the affidavits. In April, 1948 the defendant in a letter, after setting forth his holdings in the Ajax Consolidated stock, offered to dispose of his interest in the company stating that he intended to move to California. No action was taken on this letter.

In 1953 the plaintiff and the defendant began to disagree about the operations of the company. One Faulconbridge, who was brought into the company by the defendant, who sold stock to him, testified that in January, 1954 there was a meeting between the

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about the same time as the other two, and the information was brought into the company by the same person. It was certified that in January, 1954, there was a meeting between the

defendant and plaintiff at which he was present, that the defendant had said that he was dissatisfied as to the lack of agreement in the company and the high sales expenses, and that he was going to sell out unless some action was taken on it. The plaintiff asked the defendant if he would sell the stock to him and the defendant said he would. They then had a conversation out of the presence of the witness. Plaintiff testified that during this private conversation the defendant had reassured him that he would be taken care of because the defendant would not dispose of his stock to anyone who would not be friendly to him. The defendant said that the private conversation merely consisted of the plaintiff's inquiring if he, the defendant, really meant what he said about selling the stock, and the defendant assured him that he did. The defendant also testified that there was a later meeting at his office with the plaintiff and that the plaintiff again asked him if he would sell to him. The defendant said he would and the plaintiff asked him what price he was asking for the stock. The defendant said that he had never named a price on the stock and suggested that the plaintiff think it over and write him a letter making him an offer. Subsequently he received a letter, dated January 21, 1954, from the plaintiff's friend and former attorney, in which letter it was stated that he, the attorney, had a client who was willing to purchase all of the 83,800 shares of stock of Ajax which he understood the defendant owned, for a price of \$3.50 a share. The defendant also testified that on January 26, 1954 he by letter refused the offer; that within 90 days from the date of the refusal of the offer the plaintiff told the defendant that the letter had been sent in his behalf, and the defendant then told the

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plaintiff that he had refused the offer; that the plaintiff asked him what he would take for the stock and the defendant said that the plaintiff should make him an offer; that later the plaintiff came to his office and demanded the stock, stating that there was a deal between them. The defendant said that he only recalled buying the stock.

With reference to the letter the writer testified that it was written on behalf of one O'Hara, who was quite well known in the industry, that he had not discussed with O'Hara the fact that the plaintiff had an interest in some of the stock held by the defendant, but that his purpose in writing the letter was to get a commitment from the defendant to sell the stock, whereupon the plaintiff would then insist that the alleged agreement should be complied with, and 6,000 (or 60,000 shares of the split stock) should be sold to him for \$58,000. O'Hara testified that he had heard rumors that the defendant was holding stock for the plaintiff, that he made the offer of \$3.50 without any consultation with the plaintiff, nor was there anything said to him at that time that certain of the stock under the contract could be bought at a less price, that he had not agreed to retain the plaintiff in office and that he would have retained him all other things being equal, if he had acquired the stock and control of the company. The plaintiff also testified that O'Hara was not his nominee.

The plaintiff testified that he knew nothing about the letter written to the defendant nor did he have the conversation concerning it about which the defendant testified. The plaintiff also testified that when in Florida he had heard rumors that he was going to be ousted from the company. When he returned he made an appointment with the defendant to talk with him about the ouster, and the defendant then told him that he would not sell the stock to him because it was now

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much more valuable than it was at the time when he purchased it and that while he had admitted that he had an agreement he said it was not in writing and he would not comply with it. The defendant denied this. Thereupon the instant suit was filed, and shortly afterward the annual meeting of the stockholders occurred. It was argued that the defendant was responsible for the plaintiff not being elected president of Ajax at such meeting. The plaintiff had proxies with the names of himself and his former attorney, and the attorney testified that they had about 3,400 proxies which would have been enough to elect one director. Faulconbridge and the defendant controlled the company proxies. The plaintiff and his former attorney agreed that the latter should be elected director and he was. Subsequently the defendant was elected president at a meeting of the board of directors. Under the by-laws no person could be president who was not a member of the board of directors. Plaintiff's former attorney testified that he did not know that there was such a provision in the by-laws. The defendant testified that if the plaintiff had been a member of the board of directors he might have voted for him as president. In order for the plaintiff to have been elected president it was necessary that he be elected a director. He did not use the proxies which he controlled to take the step necessary to qualify him for president.

At the very threshold of the case we are required to determine the weight to be given findings of fact by a master in chancery when such findings have been sustained by the trial court and a decree entered confirming the report. As we have stated, the evidence was in sharp conflict.

In 2 I.L.P. Appeal and Error, Sec. 791, it is stated that

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findings of a master, when approved by the trial court, have the same binding force on the reviewing court as a jury verdict (Meyers v. Dorfman, 322 Ill. App. 120; Zamis v. Hanson, 302 Ill. App. 404); and if so approved will not be disturbed by the reviewing court unless they are against the manifest weight of the evidence. Where the facts produced on the trial support the findings of the master and the circuit court, the reviewing court will not disturb the decree unless the conclusion reached from the facts constitutes error as a matter of law. This rule is supported by numerous cases: Union Colliery Co. v. Fishback, 299 Ill. 165; Pasedach v. Auw, 364 Ill. 491; Schmalzer v. Jamnik, 407 Ill. 236; Spencer v. Burns, 413 Ill. 240; Freymark v. Handke, 415 Ill. 360; Midland Coal Corp. v. County of Knox, 1 Ill.2d 200; Rose v. Dolejs, 1 Ill.2d 280; Johnson v. Johnson, 1 Ill.2d 319; Rizzo v. Rizzo, 3 Ill.2d 291; Ginther v. Duginger, 6 Ill.2d 474; Allendorf v. Daily, 6 Ill.2d 577; Wechsler v. Gidwitz, 250 Ill. App. 136; Zamis v. Hanson, 302 Ill. App. 404; Phillips v. W. G. N., Inc., 307 Ill. App. 1; McVeigh v. McConnell, 313 Ill. App. 75; Merschatt v. Marschat, 1 Ill. App.2d 429.

In Union Colliery Co. v. Fishback, supra, the court says:

"\* \* \* the credibility of all the other witnesses was a question for the master and the court to consider and pass upon, and the findings of the master, when approved by the court, have the same binding force upon us as the verdict of a jury in law cases."

In Freymark v. Handke, supra, the court says:

"Where a master saw and heard witnesses testify, his findings are entitled to great weight in determining the credit to be given the testimony, and such findings, when approved by the chancellor, will not be disturbed unless manifestly against the weight of the evidence. (Bydalek v. Bydalek, 396 Ill. 65; Brubaker v. Hatjimanolis, 404 Ill. 342.)"



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In Midland Coal Corp. v. County of Knox, supra, the court says:

"An examination of the record clearly discloses that most of the basic facts involved in the present case, as found by the master and approved and confirmed by the trial court, are supported by the evidence. Such approved and confirmed findings will not be disturbed by this court unless they are against the manifest weight of the evidence. Wurth v. Hosmann, 410 Ill. 567; Zeta Building Corp. v. Garst, 408 Ill. 519; Schmalzer v. Jamnik, 407 Ill. 236."

In Johnson v. Johnson, supra, the court says:

"It was the duty of the master to determine the facts. While his findings of fact do not carry the same weight as a jury, they are entitled to due weight on review and will not be disturbed unless manifestly against the weight of the evidence. (Pasedach v. Auw, 364 Ill. 491; Stowell v. Satorious, 413 Ill. 482; Lucas v. Westray, 408 Ill. 243.) The findings were amply supported by the evidence, and the trial court so found. The record here does not justify our disturbing the findings."

In Rizzo v. Rizzo, supra, the court says:

"In determining the propriety of that decree on this direct appeal, it is evident that the findings of the master, while prima facie correct, are of an advisory nature only, (Zilvitis v. Szczudlo, 409 Ill. 252, 255;) however, where those findings are approved by the chancellor, it has been held that they will not be disturbed unless manifestly against the weight of the evidence. Freymark v. Handke, 415 Ill. 360, 365."

Counsel cites and relies on Layton v. Layton, 5 Ill.2d 506, which was a case where the finding of the master was approved by the trial court and decree entered accordingly. The court in that case holds that on the issue of delivery of a deed possession raises a presumption of delivery which can only be overcome by clear and convincing evidence and that the same presumption applies in a case of voluntary settlement where the grantee is a member of the family or a near relative of the grantor. The court holds that the plaintiff's evidence, which consisted entirely of his own testimony, is neither



clear nor convincing and that the decree was against the manifest weight of the evidence. The court says:

"The master's report, while prima facie correct, is of an advisory nature only, and a reviewing court must always consider whether the decree rendered is a proper one under the law and the evidence. (Zilvitis v. Szczudlo, 409 Ill. 252.)"

In Zilvitis v. Szczudlo, 409 Ill. 252, where again there was a master's report approved by the trial court, the Supreme Court stated that the findings of the master were based upon the allegations of the complaint unsupported by any evidence. The court held that none of the charges in the complaint had been established and that the objections to the master's report should have been sustained.

The plaintiff also relies on Kolze v. Fordtran, 412 Ill. 461, which is not applicable because in that case the court sustained the exceptions to the master's report and entered a decree contrary to the findings therein.

The plaintiff has alleged, and predicates his entire case upon the existence of a contract between him and the defendant. The burden rests upon him to prove that such a contract existed. The plaintiff argues that because the master should have found that there was a fiduciary relationship existing between plaintiff and the defendant a presumption of fraud attaches to the entire transaction and that the burden of proving that the confidence was not abused or betrayed passes to the fiduciary. In order to bring this rule into play it is necessary that the plaintiff establish that there was a fiduciary relationship existing between the parties. The rule is stated in Kolze v. Fordtran, 412 Ill. 461, where the court says:

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"A fiduciary relationship exists where there is special confidence reposed in one who, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence. It exists where confidence is reposed on one side and resulting superiority and influence is found on the other. (Johnson v. Lane, 369 Ill. 135; Neagle v. McMullen, 334 Ill. 168; Stone v. Stone, 407 Ill. 66.) The relationship may exist as a matter of law between attorney and client, guardian and ward, principal and agent, and the like, or it may be moral, social, domestic, or even personal, where the relationship does not exist as a matter of law or is sought to be established by parol evidence, the proof must be clear, convincing, and so strong, unequivocal, and unmistakable as to lead to but one conclusion. (Stone v. Stone, 407 Ill. 66; Clark v. Clark, 398 Ill. 592; Stewart v. Sunagel, 394 Ill. 209.)"

The burden of proving a fiduciary relationship would rest upon the plaintiff. On a careful consideration of the evidence with reference to such a relationship between the parties it is our opinion that the finding of the master as to this point was not against the manifest weight of the evidence.

It is also argued that the statements made in the affidavits given by the plaintiff in order to facilitate the Pyle-National settlement could not be construed as an admission against the plaintiff. These affidavits were requested by the attorney for Pyle-National as a basis for the settlement negotiations. That attorney testified in the instant case that he did not know that the plaintiff claimed to have a right to nominate a purchaser for 6,000 shares of Ajax stock for \$58,000 regardless of the current value of the stock and that had he known of such agreement he would not have agreed to settle the case for the determined amount. Under the alleged agreement there was no restriction which would prevent the plaintiff from designating himself as the nominee, nor, if at his request the stock had been transferred to his nominee at the

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same price for which it was sold, was there anything in the agreement to prevent the nominee from immediately transferring the stock to the plaintiff. It is argued by the plaintiff that such was not the intention of the parties. The intention is not the governing factor. The important point is what could or could not have been done under the alleged agreement. The master was justified in finding that the second affidavit was an admission on the part of the plaintiff which might properly have been construed as contradicting the position he now takes in the instant case, and the master was justified in rejecting the attempted explanation in the testimony offered on behalf of plaintiff.

There seems to be no question that the value of the stock of Ajax Consolidated increased materially between 1947 and 1957. There is also testimony in the record that upon the plaintiff's request the defendant had transferred the shares of the Ajax Consolidated stock to several persons, four of whom testified before the master, and that they had paid \$10.00 per share. The defendant testified that he had transferred the stock on the recommendation of the plaintiff, but that the stock was transferred to these particular persons because their ownership of the stock would be of value to the company. The plaintiff testified to the same effect, but also that the persons to whom the transfers were made were friends of his and that he could depend on them to vote the stock in his favor although he said nothing to them about it; and the transferees testified that they had full and complete ownership of the stock so purchased and that since their purchase some of them had sold their shares.

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The master in his original report finds that the plaintiff had withdrawn \$50,000 from Ajax shortly before he sold the stock to the defendant, and that the \$50,000 had not been repaid. Subsequently a stipulation was entered into by the parties to the effect that the \$50,000 had been repaid shortly after the stock had been sold to the defendant, and that there was no evidence in the record that at the time of the sale the defendant knew of the withdrawal of the \$50,000. The master had in his original report discussed this withdrawal and its effect upon the book value of the stock at the time of the sale, and also considered that the effect of the nondisclosure by the plaintiff to the defendant of the withdrawal of the \$50,000 would support his finding that no fiduciary relationship existed between the parties. In his supplemental report the master concludes that even though the money had been paid shortly after the agreement had been entered into between the plaintiff and the defendant, nevertheless the nondisclosure still would support his finding that no fiduciary relationship existed. The facts disclosed by the stipulation do not materially affect the conclusions reached by the master in his original report.

The plaintiff also contends that the court could not have disregarded the testimony of plaintiff and his former attorney since their testimony was only contradicted by the testimony of the defendant. The credibility of witnesses is a question for the master and the trial court to consider and pass upon. Union Colliery Co. v. Fishback, 299 Ill. 165. The rule is that where the testimony of a witness is uncontradicted either by positive testimony or circumstances and is not inherently improbable it cannot be disregarded but must be considered with all the other evidence. In the case before us the



testimony of the two witnesses was contradicted and the master undoubtedly considered it with all the other evidence in the case including the affidavits signed by the plaintiff, and so reached his finding.

The master in his report finds that the plaintiff had failed to prove the existence of the alleged contract. His findings in that respect were not against the manifest weight of the evidence.

The defendant also urges that even though the finding had been that such a contract was in existence the contract was void as being against public policy. The plaintiff relies on the case of Venner v. Chicago City Ry. Co., 258 Ill. 523. In that case the court, after stating that there was no rule of public policy in this State which prohibits the owners of a majority of stock of a corporation from entering into an agreement for the purpose of controlling the corporation and its management, said:

"On the other hand, an agreement is invalid whose object is not the benefit of all the stockholders equally but is some unfair advantage to the parties to it, only, as where one of the parties is to have a certain office at a certain salary, or the parties to the agreement are to receive the profits to be made \* \* \* (Italics ours.)

The other cases cited by the plaintiff deal with and approve agreements entered into by a majority of the stockholders of corporations under which they agree to elect each other as directors and acquire and keep control and management of the company. Gumbiner v. Alden Inn, Inc., 389 Ill. 273; Faulds v. Yates, et al., 57 Ill. 416; Higgins v. Linsingh, 154 Ill. 301; Venner v. Chicago City Ry. Co., 258 Ill. 523; Thompson v. Thompson Carnation Co., 279 Ill. 54.

In Teich et al. v. Kaufman, 174 Ill. App. 306, a majority of the stockholders entered into an agreement that for a period of five years all the shares of stock owned by them should be voted in the



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same way on any proposition that might come before any stockholders' meeting, and it was further agreed that all the parties thereto should be elected directors of the corporation and should vote and secure the election of designated individuals as officers of the corporation. The court held that the contract was more than an agreement to elect one another as directors and acquire control and management of the company and secure options on one another's stock, which contracts have been upheld. The court said:

"But it was an agreement to bind and control their judgment as such directors without regard to the interests of the stockholders they represented. Under it, they were obligated as directors to pursue a definite course of action for a series of years, looking specifically to their profit as officials or employees of the company, regardless of the effect upon it or its stockholders."

In support of its opinion the court cites West v. Camden, 135 U.S. 508, a case in which the plaintiff sued the defendant for damages for breach of an alleged agreement on the part of the defendant, a director, to keep the plaintiff permanently in the position of vice president of the company irrespective of its interests. Even though in that case, as in the instant case, there was to be no personal gain to the defendant director, the court said:

"The principle involved is well settled in regard to public employments. \* \* \* The same doctrine has been applied to the directors of a private corporation. charged with duties of a fiduciary character to private parties, on the view that it is public policy to secure fidelity in the discharge of such duties. \* \* \*

"We think this principle is equally applicable on the ground of public policy, although there was not to be any direct private gain to the defendant; for, as was said by the Circuit Court in this case, it was the right of the other stockholders in the Baltimore United Oil Company 'to have the defendant's judgment, as an officer of the company, exercised with a sole regard to the interests of the company.' A personal liability for damages on the part of the defendant,

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in case the plaintiff should be removed after an agreement of the character alleged, was calculated to be a strong incentive to the defendant to act contrary to the true interests of the company and of its other stockholders. \* \* \*

The court held the agreement void as against public policy.

In the Teich case the court also cites with approval Woodruff v. Wentworth, 133 Mass. 309, which held an agreement of a stockholder to vote for a certain party as manager and to increase his salary, along with other officers', to be void as against public policy. The court also cites Guernsey v. Cook, 120 Mass. 501, in which the court says:

"The objection that the contract is illegal, although it comes with no good grace from the defendant, is allowed to prevail, not as a protection to him, but for the sake of the public good, and because the public will not lend its aid to enforce an illegal contract."

In accord with the Teich case is Seitz v. Michel, 181 N.W. 102 (Minn.).

A corporation is entitled to have the unbiased and uninfluenced judgment of each of the directors when acting in its behalf. The directors owe a duty of managing the corporate affairs honestly and impartially in behalf of the corporation and all the stockholders.

19 C.J.S. Corporations, Sec. 764; Farwell v. Pyle-Nat. Headlight Co., 289 Ill. 157.

In the instant case the alleged agreement was between the seller and purchaser of stock, whereby the purchaser, who was a director of the corporation involved, was committed to vote for the seller of the stock for the office of president of the corporation for an indefinite period. This binding of the defendant as a director to a specific course of action regardless of its effect upon the corporation would be incompatible with the performance of defendant's duties, in his fiduciary relationship to all the stockholders, devolving upon



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him in such relation. Under the authorities above cited such an agreement is void as against public policy. In his reply brief the plaintiff argues that the purpose of the agreement was not to perpetuate the plaintiff as president of Ajax but merely that the defendant would not himself use the stock for the purpose of ousting the plaintiff, and that if the defendant in good conscience thought any conflict had developed because of his duties as a director, chairman of the board or as a stockholder, he could have relieved himself of this obligation by giving the plaintiff the right to nominate a purchaser, and therefore urges that the above cases are not applicable. In any case where a stockholder or a director has agreed that he vote his stock in a particular way, he could always relieve himself of the obligation by resigning as director or disposing of his stock. That the party bound by the agreement has such a right does not in any way affect the public policy as expressed in the cases.

The findings of the master, approved by the chancellor, were not against the manifest weight of the evidence. Nor can we say that the judgment entered by the trial court was an improper one under the law and the evidence in the record. Accordingly the judgment of the Superior Court is affirmed.

Judgment affirmed.

Robson and Schwartz, JJ., concur.

~~Robson and Schwartz, JJ., concur.~~

Abstract only.

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Abstract only.

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47380

THE CITY OF CHICAGO,

Appellee,

v.

MARGARET NESBITT, et al.,

Appellants.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

19 I.A.<sup>2d</sup> 220<sup>2</sup>

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

This is an appeal by eight defendants convicted in a bench trial of violating an ordinance of the City of Chicago and fined \$200 each. The principal question presented is whether the findings of the trial court were against the manifest weight of the evidence.

The complaints charged that each of the defendants on or about August 5, 1957, "did make or aid in making an improper noise, riot, disturbance, breach of peace, or diversion tending to a breach of the peace, within the limits of the city. In violation of chapter 193, section 1, subsection 1 of the Municipal Code of Chicago."

The only evidence offered on behalf of the City was the testimony of the arresting officer. He testified that on the night of August 5, 1957, he was on duty, in uniform, in the neighborhood of 39th street in Chicago. He was alone and on foot. During the night he observed Margaret Nesbitt, Ruth Carter, Doris West, Jean Burrell, Alma Massenburg, Valeeta Hayden, Barbara Barnes, and Joan McDaniel in the 800 block on East 39th street. He testified that all were "walking up and down," and "approaching different men." Subsequently, when all of the



women were in the same tavern at 814 East 39th street, he arrested them. The officer testified on cross-examination that when he saw each of the defendants on the street he did not then make the arrest and that he had not arrested any of them while talking to any man. Each of the defendants testified that prior to entering the tavern she had not been walking "up and down the street" or talking to any men on the street.

Did the City prove by a preponderance of the evidence the offense for which the defendants have been penalized? This is an action to recover a penalty for the violation of an ordinance and is technically a civil rather than a criminal proceeding. City of Kewanee v. Puskar, 308 Ill. 167 (1923); Village of Riverside v. Kuhne, 335 Ill. App. 547 (1948). It is governed by the Civil Practice Act. City of Chicago v. Tearney, 187 Ill. App. 441 (1914).

The City argues that the alleged conduct of the defendants tended to debauch public morals. We agree that streetwalking or soliciting has such an effect. For this reason there is both an ordinance in the City of Chicago and a provision in the Illinois Criminal Code designed to prohibit such conduct. See Municipal Code of Chicago, chap. 192, sec. 5; Ill. Rev. Stat. 1957, chap. 38, par. 163. However, neither that ordinance nor that statute is involved on this appeal but defendants are charged with breach of the peace. The evidence presented fails to prove that the defendants made any improper noise, riot, or disturbance or that their conduct was a diversion tending to a breach of the peace. There is no evidence to indicate that, even if the various





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defendants did approach men on the street, they did so for any illegal purpose whatsoever. The evidence does not reveal what, if anything, the defendants said to the men they allegedly approached. The Supreme Court of Michigan considered the probative effect of evidence substantially similar to that offered by the City in the instant case. In Larson v. Feeney, 196 Mich. 1, 162 N.W. 275 (1917), the court said (162 N.W. at p. 276):

"If plaintiff can be conclusively presumed to be a streetwalker or a soliciting prostitute by coughing and saying, 'Hello there, kid,' as she passes certain men on the street, the personal liberty of the citizen of this state has reached a pretty low ebb. As well might defendant have concluded that she was disorderly because she turned up her nose at him, or because she was saucy to him, or because she was silly or bold and said indiscreet things. It is possible for a girl to be bold, silly, and have bad manners on the street and still be immune from arrest without a warrant."

We cannot allow the imposition of the penalties against the defendants to rest solely on surmise. There must be substantial proof. Here there was none.

The judgments of the trial court against the respective defendants are reversed.

Judgments reversed.

McCormick, P. J., and Schwartz, J., concur.

Abstract only.



## A

405

## Agenda No. 1

2d

Appeal from  
Circuit Court,  
Madison County,  
Illinois

DR. JACK DAYAN,

Plaintiff-Appellee,

and

Plaintiff,

vs.

**Defendants-Appellants.**

BARDENS, P. J.

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contempt of court. The finding grew out of the board's refusal to permit plaintiff to use the facilities of the hospital, pending appeal from the aforementioned case, in the face of an order continuing the original temporary injunction in force.

The principal allegation of error is a refusal of the trial court to grant a change of venue. We note however that the application for a change of venue, filed August 20, 1957, came after an adverse ruling entered August 13, 1957, on a motion to dismiss the citation for contempt and that the affidavit states that defendants first were aware of the alleged prejudice in the early part of August. It is apparent, therefore, that the application was not timely, having come after the defendants had argued a motion to dismiss. Flassig vs. Newman, 317 Ill. App. 635, 47 NE 2d 527.

We have given consideration to the other arguments urged by appellants but find them without merit. The judgment of the lower court is accordingly affirmed.

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Culbertson & Scheineman, J.J., concur.

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47267

BERNARD MAJEWSKI, individually and as trustee under a certain trust deed recorded as document number 16167039

Plaintiff - Appellee,

v.

VINCENT JAMES GALLINA; MARION KOGUT, individually and d/b/a M. K. Realty; SUPREME SAVINGS AND LOAN ASSOCIATION, a corporation; M. LUPARELLO; G. PETERSEN; and FRANK RUSIN,

Defendants,

On Appeal of VINCENT JAMES GALLINA and FRANK RUSIN,

Defendants - Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

19 I.A.<sup>2d</sup> 222

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a suit in equity to establish a constructive trust as to certain real property which plaintiff claims he conveyed because of fraud by defendants. He prays for a restoration of the status quo before the transaction and in the alternative he seeks money damages. The case as to defendant Kogut has been dismissed due to her death. The Chancellor approved the report of a Master in Chancery, and entered a decree in favor of plaintiff for \$5375.00, damages from the fraud of defendants. Defendants have appealed from the decree. Plaintiff has cross appealed from that part of the decree refusing to set aside the conveyance and denying his prayer for a constructive trust and a return to the status quo ante.

Plaintiff's Notice of Cross Appeal stated that a freehold is involved in this appeal and served notice that he intended to move for a transfer to the Supreme Court under





section 86 of the Civil Practice Act. His brief raises the question that this court lacks jurisdiction because a freehold is involved. Section 75, Civil Practice Act.

Plaintiff prayed for a decree establishing a constructive trust and setting aside the conveyance. In Burrows v. Palmer, 10 Ill.2d 344, plaintiff claimed that a conveyance of real property had been in trust, and not absolutely as defendant had contended, and the Supreme Court took the case on direct appeal on the ground that a freehold was involved. And the fact that the lower court found no freehold interest in the plaintiff does not bar him from asserting here that a freehold question is involved. Rossiter v. Soper, 384 Ill. 47.

There is no merit in the contention that plaintiff may not cross appeal because the decree was entered on his motion. He did not succeed in setting aside the conveyance, has not accepted the damages under the decree, and so is entitled to cross appeal.

Defendant contends that plaintiff's motion to transfer should be denied because he has vacillated between acquiescence in the conveyance and rescission of it. Plaintiff is entitled to allege inconsistent remedies (section 44, Civil Practice Act), and if he has done so he is not precluded from questioning the jurisdiction of this court. The decree decided, against his one theory, that the freehold had passed from him to defendant, and in his favor on his other theories.



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Finally, in his Notice of Appeal defendant Rusin prays that he be declared owner of the premises involved in the suit, free and clear of all interest on the part of plaintiff. Thus the freehold is directly involved in this appeal.

Title to the freehold is so put in issue by the pleadings and assignments of error that decision of this case necessarily involves a determination of that issue, and therefore we have no jurisdiction. Stevens v. Stevens, 14 Ill.2d 99; People v. Hess, 7 Ill.2d 192.

An order will be entered in this court transferring the cause to the Supreme Court and directing the clerk to transmit the transcript and all files therein, with the order of transfer, to that court, as provided for by section 86, Civil Practice Act.

CAUSE TRANSFERRED TO THE  
SUPREME COURT.

LEWE, P.J. AND MURPHY, J., CONCUR.

ABSTRACT ONLY.



407  
47352

MARJORY WEDEL REINHARD,

Appellant,

v.

RICHARD HARVEY REINHARD,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

191.A. 223<sup>21</sup>

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is a suit in chancery, to have adopted as a decree of the Circuit Court a Georgia divorce decree entered on October 23, 1951, and to determine and collect alimony arrearages.

On April 3, 1957, the chancellor entered an order, finding that the Georgia decree was valid, in full force and effect, and ordered its adoption as a decree of the Circuit Court of Cook County, Illinois.

On April 11, 1957, defendant filed, in the instant cause, his petition to reduce alimony, alleging in substance that due to illness and changed circumstances, he could not pay the accumulated alimony, and that plaintiff had substantial income, past and present. He prayed that the past due alimony be reduced, and that the decree be modified reducing future alimony. On his motion plaintiff was ordered to answer interrogatories as to her financial condition. On May 15, 1957, plaintiff filed her motion to strike defendant's petition, alleging (1) that the court had no power to reduce past due alimony; and (2) that as a matter of law the Georgia decree was not subject to modification by the Georgia court, either as to past due or future alimony, and therefore was not subject



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to modification in Illinois.

On June 28, 1957, no evidence being heard, an order was entered finding (1) that defendant had failed to make alimony payments under the Georgia decree and was \$4600 in arrears; (2) that since the entry of the Georgia decree plaintiff had earned \$3155; (3) that a decree of another state, once adopted by an Illinois court, is enforced in accordance with the laws of Illinois; and (4) that under the laws of Illinois, income of the plaintiff should be credited to the payments of alimony provided for in the decree. On these findings (1) defendant was given credit for the sum of \$3155 against the \$4600 past due alimony; (2) judgment was entered against defendant for \$1445; (3) plaintiff's motion to strike defendant's motion to reduce alimony was denied; and (4) defendant's motion to reduce future alimony was continued for hearing. Plaintiff appeals from the order of June 28.

Plaintiff's principal contention is that the past due alimony had become vested in plaintiff and the court erred in crediting against the amount due any part of plaintiff's earnings since the entry of the Georgia decree.

Defendant admits past due alimony is vested and cannot be modified by subsequent court order (Hallett v. Hallett, 10 Ill. App. 2d 513, 519), but defendant contends that the trial court merely applied equitable principles and the law of set off, because defendant was precluded from applying for a reduction in alimony under the "harsh" Georgia law. Under Georgia law the divorce decree could not be amended or altered, and defendant argues that when





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plaintiff submitted herself to Illinois courts, he immediately availed himself of the provisions of the Illinois Divorce Act, Ill. Rev. Stat. 1957, chap. 40, par. 19, in an attempt to reduce the Georgia alimony order.

The cases cited by defendant to support his theory of set off are not in point. It is true that equity has inherent power to allow or compel a set off, but courts of equity will not enforce vague equities of set off which involve no rights or interests protected by the recognized rules of justice. 80 C.J.S. 13. As a general rule, a party cannot avail himself of a certain matter as a set off, unless it is a legally subsisting matter on which he could maintain an independent action. 80 C.J.S. 34, par. 25. It could hardly be said that defendant would have the legal right to claim wages earned by his former wife. The trial court, in crediting the earnings of plaintiff against the past due alimony, was modifying, by a subsequent court order, the admitted vested right that plaintiff had to past due alimony. This is not proper. Permission to a defendant to withhold alimony payments, and later seek to reduce the arrearages by earnings of his former wife, is fraught with inequitable possibilities. The courts of this state have never permitted it, and defendant conceded that the Georgia courts may not modify or alter the alimony provisions of the decree, which is the basis of the instant suit.



Plaintiff had a vested right in past due alimony in Illinois as in Georgia and was entitled to have that right enforced by the same remedies as are applicable to domestic decrees for alimony (U. S. Constitution, Art. 4, §1; Hallett v. Hallett, 10 Ill. App. 2d 513, 525), and a foreign decree, once adopted as an Illinois decree, is entitled to full faith and credit as to future payments. Light v. Light, 12 Ill. 2d 502, 511 (1958). Illinois having adopted the Georgia decree, plaintiff was entitled to have it enforced according to Illinois modes of procedure, even though the mode of procedure to enforce its collection may not be the same as that of Georgia (Roberts v. Roberts, 11 Ill. App. 2d 86, 92; Sistare v. Sistare, 218 U. S. 1 (1910)), providing that the mode of procedure used to enforce its provisions did not result in a modification of the original decree.

We do not believe it necessary to determine any other question at this time. Therefore, that part of the order of June 28, 1957, giving defendant credit for plaintiff's earnings against past due alimony, due by him, is reversed, and the cause is remanded with directions to enter judgment against defendant for the full amount of the past due alimony.

ORDER REVERSED IN PART AND  
CAUSE REMANDED WITH DIRECTIONS.

LEWE, P.J., AND KILEY, J. CONCUR.

ABSTRACT ONLY.



Abstract

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415

19 I.A. 223<sup>2d</sup>

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

General No. 10162

Agenda No. 1

People of the State of Illinois,

Plaintiff-Defendant in Error,

vs.

James Griffis,

Defendant-Plaintiff in Error.

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) Error to County  
) Court of  
) McDonough County  
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Roeth, P.J.

Defendant was convicted by a jury of the crime of contributing to the delinquency of a minor child. By the jury's verdict his punishment was fixed at imprisonment in the county jail for one year and a \$200.00 fine. He prosecutes this writ of error to review his conviction.

Defendant contends (1) that his discharge for want of prosecution within 4 months, from a charge of taking indecent liberties based upon the same set of facts and against the same child, barred a subsequent prosecution on the charge on which he was convicted, (2) the bill of particulars furnished was not sufficiently specific, (3) certain evidence of other acts against other children was erroneously admitted, (4) proof of an oral confession was erroneously admitted, (5) the testimony of the prosecuting witness was not corroborated so that the evidence was not sufficient to sustain

Abstract

44

100-100000

STATE OF ILLINOIS  
IN SENATE  
JANUARY 1901

General No. 1000

People of the State of Illinois

First Civil District

vs.

James Griffin

Defendant

Death, 1901

Defendant was convicted of murder

in the first degree of murder

and was sentenced to the State Prison

for a term of years

conviction

Defendant contends that

within a month, from the date of

upon the same set of facts

subsequent prosecution on the same

(2) the bill of particulars returned

(3) certain evidence of other acts

erroneously admitted; (4) that

admitted; (5) the testimony of the

corroborated so that the value of

a conviction, (6) he was deprived of the opportunity of making application for probation.

Since the sufficiency of the evidence to sustain a conviction is questioned, we find it necessary to review the evidence. The defendant is an ordained minister or clergyman by profession. On September 1, 1956 he had charge of a centennial program at a town in McDonough County at which a group of Boy Scouts took part by performing Indian dances. After the program five of the boys went to the home of defendant to stay all night. These boys were in the 13-14 year old age group. They arrived there sometime between 12 midnight and 1:00 A.M. As the boys prepared to go to bed the defendant dressed up with a bed cover and mask and for 15 or 20 minutes jumped and walked around the living room where the boys were, making funny noises and flicking the lights of the living room on and off. The boys then spread their bed rolls and a sleeping bag on the living room floor and went to bed. The prosecuting witness and one of the boys were in the sleeping bag and the other three boys had their bed rolls placed side to side and were using a common cover. With the boys thus bedded down, the defendant went into an adjoining bedroom to go to bed. Three of the boys testified to the foregoing facts and the defendant corroborates them in the essential particulars.

The prosecuting witness then went to sleep and according to his testimony was thereafter conscious of the defendant's presence when defendant came to him and insisted that he was crowding his sleeping





partner out of bed and that he should come into the bedroom and sleep with the defendant. The witness demurred whereupon defendant picked him up and half dragged and half carried him into the bed in the bedroom. Defendant then directed the witness to take his pants off which he did. He started to go to sleep, whereupon the defendant began to rub the witness' stomach and privates and attempted to place his penis in the witness' rectum. Finally the witness went to sleep. Defendant denies having the witness in bed with him, denies entering the room where the boys were after retiring, and denies that he committed the acts complained of.

One of the boys who was sleeping on a bed roll testified that after he started to go to sleep, the defendant came over to him and asked him to go to bed with the defendant, and that he heard the defendant make the same proposal to one of the boys along side of him and thereafter to the prosecuting witness. He also says he heard the prosecuting witness protesting and requesting to be put down. The boy next to him testified that he was awakened by the defendant rubbing his stomach and privates and that he refused to go to bed with the defendant.

The defendant was arrested by the Sheriff of McDonough County and the then States Attorney. He was brought to the Sheriff's office and questioned by the States Attorney. The States Attorney (not the States Attorney as at the time of trial) told him the details of what he was charged with. The defendant talked at some length, neither admitting nor denying the charge. He did on that occasion admit being in bed with the prosecuting witness. Although he finally denied

particular out of bed and that he should come into the bedroom and  
sleep with the defendant. The witness testified that the defendant  
picked him up and half dressed and half carried him into the  
the bedroom. Defendant then directed the witness to go to the  
off which he did. He testified that he did not go to the  
begin to rub the witness' stomach and thighs and attempt to  
place his penis in the witness' rectum. The witness testified  
to sleep. Defendant testified that he did not go to the  
denies entering the room where the witness was after the witness  
denies that he carried the witness to the bedroom.  
One of the boys who was present at the time of the alleged  
after he started to go to bed, the witness testified that he  
and asked him to go to bed with the defendant, and that he went to the  
defendant asked the same question to the other boy and the other boy  
him and thereafter to the defendant. The witness testified that he heard  
the prosecuting witness protesting and replying to the defendant.  
The boy next to the defendant testified that he did not go to the  
rubbing his stomach and thighs and that he refused to go to bed  
with the defendant.  
The defendant was arrested at the Sheriff's Office County  
and the then State Attorney. He was removed to the Sheriff's Office  
and questioned by the State Attorney. The witness testified that  
the State Attorney as at the time of trial told him the details of  
what he was charged with. The defendant said he did not know, neither  
admitting nor denying the charges. He did not consider what being  
in bed with the prosecuting witness. Although he finally testified

the charge, defendant admitted that he had rubbed the stomach of the prosecuting witness to relax him so that he would go to sleep and that he might have accidentally touched his privates. The testimony of the States Attorney is corroborated by the Sheriff who was present during the interview.

Certain of defendant's contentions can be disposed of rather briefly. First, as to the contention that the testimony of the prosecuting witness was not corroborated-- it is not necessary that each and every fact testified to by the prosecuting witness must be corroborated. This type of crime is ordinarily committed in secret. A conviction cannot be ruled out because proof of the overt act is made solely by the prosecuting witness. People v. Kirilenko, 1 Ill. 2d 90, 115 N.E. 2d 297. Here the prosecuting witness is corroborated in many of the essential details by the testimony of the two other boys and by defendant's own admissions to the officers, if the jury believed the two officers (and they apparently did), and their testimony was not otherwise inadmissible.

As to the contention that the bill of particulars was not sufficiently specific, suffice it to say, that defendant demanded and was furnished a bill of particulars. He made no objection to the bill of particulars as furnished, in the trial court and therefore cannot question its sufficiency here.

The contention that defendant was deprived of an opportunity of making an application for probation is based on the misconception that by entering judgment on the jury's verdict, the trial court cut off



the right to apply for probation. After said judgment was entered the defendant did file certain post trial motions. He likewise could have filed a motion for probation. It is the pronouncing of sentence that cuts off this right. Furthermore, we cannot see how defendant can complain, since no attempt to apply for probation was ever made.

The contention that the testimony of the two officers amounted to proof of an oral confession and was not admissible because defendant had not been furnished with a list of witnesses to it prior to arraignment is likewise without merit. A confession is an acknowledgment of guilt of the whole offense as charged and not of any particular fact connected with the case. People v. Manske, 399 Ill. 176, 77 N.E. 2d 164; Johanson v. People, 197 Ill. 48. In the case before us the defendant denied his guilt of the offense charged at the time he was interviewed. The most that can be said of the statements attributed to him is that they were admissions of facts criminalizing in their nature.

It is next contended that proof of the advances made by the defendant to the two boys other than the prosecuting witness and proof of the acts done to one of them constituted proof of the commission or attempt to commit other unconnected crimes and was therefore inadmissible. The rule is of course elementary that when a defendant is on trial for one offense, testimony tending to show the commission of a separate and distinct crime is not admissible. But there are exceptions to the rule which are so numerous that it has been said it is difficult to determine which is the more extensive, the doctrine

the right to reply for Robert. After that, the defendant  
the defendant did this certain, and what was said, and I think  
have filed a motion for production. I think the defendant  
that case off to the side. I think the defendant  
consequently, there is no need to say anything more about  
The defendant's motion for production was denied.  
to proof of the fact that the defendant is guilty of the crime  
and has been convicted of the crime. I think the defendant  
arrangement is in the case. I think the defendant  
tent of the fact of the crime. I think the defendant  
last connected with the crime. I think the defendant  
1st; John Doe, 1st; John Doe, 1st; John Doe, 1st;  
defendant denied the fact of the crime. I think the defendant  
was interviewed. I think the defendant was interviewed  
attributed to him is that he was interviewed. I think  
in their nature.  
It is not necessary that the defendant should be  
defendant to the fact of the crime. I think the defendant  
proof of the fact of the crime. I think the defendant  
on attempt to commit other offenses. I think the defendant  
indefinite. I think the defendant is guilty of the crime  
is on trial for an offense, and the defendant is on trial  
of a separate and distinct crime is not necessary. I think  
exceptions to the rule which are so numerous that it is not  
it is difficult to remember which is the rule and which is the exception.

or the acknowledged exceptions. One of the exceptions is that when the evidence tends to throw light upon a particular fact or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge which a reviewing court will not interfere with, unless it is clear that such testimony has no legitimate bearing upon the question at issue and is calculated to prejudice the accused in the minds of the jurors. Also evidence has been held admissible concerning acts which are closely and inextricably mixed up with the history of the guilty act itself as to form part of one chain of relevant circumstances. Tested by the foregoing rules we hold that the questioned testimony was admissible.

The final and most strenuous contention of defendant is the first contention above noted. This arises by virtue of the following: On the 6th day of September, 1956, a complaint and information charging the defendant with the crime of taking immoral, indecent and improper liberties with Robert Foster, a child, on the 2nd day of September, 1956, was filed in the Court of Police Magistrate, Lewis E. Ebey. A warrant for the arrest of the defendant on the aforesaid complaint was issued, and, pursuant to said warrant, the defendant was arrested and committed to the County Jail of McDonough County, Illinois by the Sheriff to await hearing.

A preliminary hearing upon the aforesaid complaint was held in the Court of Police Magistrate Lewis E. Ebey on the 22nd day of October, 1956, and at the conclusion of such hearing the defendant was bound over to the Grand Jury for investigation and consideration.

on the acknowledged receipt. One of the witnesses who was present when the evidence was taken in 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2



On the 5th day of January, 1957 the Information in this cause was filed. The Information charged the defendant with the crime of contributing to the delinquency of Robert Foster, a child, by performing indecent and immoral acts in the presence of and on the person of the said Robert Foster on the 2nd day of September, 1956.

The defendant was not admitted to bail, nor given trial after his arrest on the 6th day of September, 1956, as aforesaid, but was continuously held prisoner in the County Jail under the charge of taking immoral, indecent and improper liberties with Robert Foster, as aforesaid, until the 7th day of January, 1957, when the Circuit Court of McDonough County, Illinois, Berdens, J., at the conclusion of a hearing in said Court, granted the motion of defendant, James H. Griffis, for discharge for want of prosecution from the aforesaid charge of taking immoral, indecent and improper liberties, and ordered the defendant, James H. Griffis, discharged.

The defendant was not released from custody following his aforesaid discharge on the indecent liberties charge, but was thereafter held prisoner in the County Jail of McDonough County, Illinois, pursuant to the Capias and the Information in this cause. Defendant contends that having been discharged from the indecent liberties charge he was entitled to release from the charge in this cause.

In Illinois it has been uniformly held that the crimes of contributing to the delinquency of a minor (Chap. 38, Sec. 104, Ill. Rev. Stat. 1955) and indecent liberties (Chap. 38, Sec. 109, Ill. Rev. Stat. 1955) are separate and distinct offenses in law even though the same facts are the basis for each charge. People v.



Jensen, 392 Ill. 72, 64 N.E. 2d 1; People v. Raddatz, 403 Ill. 48, 65 N.E. 2d 32; People v. Labiak, 7 Ill. 2d 522, 131 N.E. 2d 633.

In People v. Jensen, supra, defendant was indicted for sexual crimes against an eleven-year-old girl. The indictment consisted of six counts, the first three charging rape, the fourth indecent liberties, and the fifth and sixth charging acts tending to render the prosecuting witness a delinquent child. All counts except count four were nolle prossed. Defendant was tried and found guilty and on appeal contended that granting of a nolle prosequi on the charge of committing acts tending to render prosecutrix a delinquent child in the sixth count constituted a finding of not guilty on the indecent liberties charge in count four. Defendant urged that the misdemeanor charged in count six was automatically included in the felony charged by count four, so that dismissal of the misdemeanor barred further prosecution of the felony. In rejecting defendant's contention the court said, "The criminal offenses of indecent liberties and contributing to the delinquency of a child are separate and distinct offenses. The fact that the same proof may support both <sup>charges</sup> is immaterial."

In People v. Raddatz, supra, first count of indictment charged defendant with taking indecent liberties with a seven-year-old girl. The second count, upon which he was found guilty, charged that the same indecent liberties directly tended to render the child guilty of indecent and lascivious conduct, viz., a delinquent child under Sec. 104. Defendant was tried on both counts. The jury returned

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a verdict of guilty on count two, the contributing to delinquency charge. On appeal defendant contended that there was an implied acquittal on count two for the reason that the jury did not find him guilty on count one, the indecent liberties charge, although the evidence was the same on both counts. The court, in denying defendant's argument, stated, "The offenses of taking indecent liberties and contributing to the delinquency of a child are separate offenses. Where the indictment, in separate counts, charges both offenses, it cannot be said that because the same evidence was common to both counts a legal relationship is established between the two offenses. (People v. Jensen, 392 Ill. 72.) The implication envisioned by the plaintiff in error is a pure assumption which has no persuasive force in law."

In People v. Labiak, supra, the court again emphasized that the crimes of contributing to delinquency and indecent liberties are separate offenses under the law even though the same facts are relied on in support of each charge. In that case count one of the indictment charged defendant with taking indecent liberties with an eight-year-old girl, and in count two with contributing to the delinquency of a minor. At the close of the evidence the People withdrew the delinquency count and elected to stand on count one, the indecent liberties charge. Defendant was found guilty of indecent liberties. On appeal the defendant argued that the trial court erred in refusing to give instructions on count two, it being defendant's theory that contributing to delinquency and taking indecent liberties are not separate offenses, but merely degrees of the same offense. Conceding that where there are several degrees of the same unlawful act, instructions may be

verdict of guilty on count two, the contribution to delinquency charges. On appeal defendant contended that there was an implied conditional on count two for the reason that the jury did not find him guilty on count one, the instant offense charge, although the evidence was the same on both counts. The court, in denying defendant's argument, stated, "The argument is without merit. The instant offense and contributing to the delinquency of a child are separate offenses. Where the instant offense is charged on count one, it cannot be said that because the same evidence was common to both counts a legal relationship is established between the two offenses. (People v. Jackson, 37 Ill. 2d 100, 101). Application of this principle to the instant case is also inapplicable which has no persuasive force in law.

In People v. Jackson, supra, the court stated that the instant offense of contributing to delinquency and instant offense of separate offenses under the law were charged on count one and count two in support of each other. In that case the court found that the defendant charged defendant with taking instant offense and instant offense on count one and count two with contributing to the delinquency of a child. At the close of the evidence the judge withdrew the instant offense and elected to stand on count one. The instant offense charge on count one was found guilty of instant offense. On appeal the defendant argued that the trial court should have withdrawn the instant offense on count two, it being defendant's theory that contributing to delinquency and taking instant offense are not separate offenses, but merely degrees of the same offense. Conceding that there were two separate degrees of the same offense, instructions may be

given as to the lesser offense, the court stated, "No such relationship, however, exists between the crimes now in question. Even a cursory examination of the applicable statutes shows that the crime of contributing to the delinquency of a child, although limited in punishment, is much greater in scope than the crime of taking indecent liberties... We have held on at least two prior occasions that the crimes of taking indecent liberties and contributing to delinquency of a child are separate and distinct offenses even though included in separate counts of an indictment. (People v. Sadtatz, 403 Ill. 48, 85 N.E. 2nd 32; People v. Jensen, 392 Ill. 72, 64 N.E. 2nd 1.)".

Defendant claims that in determining whether separate offenses are involved, the test is whether the facts charged in the second indictment would, if found true, have justified a conviction under the earlier indictment, and that if so, then there is but one offense. But in People v. Allen, 368 Ill. 368; 14 N.E. 2nd 397, and People v. Cicci, 3 Ill. 2nd 619; 137 N.E. 2nd 40, and People v. Harrison, 395 Ill. 463; 70 N.E. 2nd 596, all cited by defendant as authority for this alleged test, the holding of the court was that if on a trial under the first indictment, defendant could have lawfully been convicted of the charge contained in the second indictment, then there is but one offense. In applying this reasoning to the instant case the question would be whether defendant, if indicted and tried on the original charge of indecent liberties, could have been in that case, convicted of the crime of contributing to the delinquency of a minor.

...as to the lesser offense, the court stated, "A conviction  
...ship, however, exists between the crime of ...  
...every other crime of the ...  
...of contribution to the ...  
...notwithstanding, it may be ...  
...independent ...  
...that the ...  
...self-defense ...  
...included in ...  
...the ...  
...and ...

...the ...  
...are ...  
...indirect ...  
...the ...  
...But ...  
...at ...  
...392 ...  
...for ...  
...trial ...  
...convicted ...  
...is ...  
...the ...  
...original ...  
...convicted ...



In view of the decisions of the Illinois Supreme Court holding that contributing to delinquency and indecent liberties are separate crimes, it is clear that had defendant been tried on the indecent liberties charge he could not have been, in that proceeding, convicted of the crime of contributing to delinquency. We are of the opinion that the discharge of defendant for want of prosecution on the indecent liberties charge did not operate to discharge him on the charge of contributing to the delinquency of a minor.

Finding no error in this record, the judgment of the County Court of McDonough County is affirmed.

Affirmed.

Keynolds, J., and Carroll, J., concur.

[illegible]

416

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

General No. 10172

agenda .o. 6

Ethel Smith,

Plaintiff-appellee,

vs.

The Board of Education of  
Community Unit School  
District Number 1 of Coles  
and Cumberland Counties,  
Illinois,

Defendant-appellant.

191<sup>24</sup> 11 22 6  
Appeal from the  
Circuit Court of  
Coles County.

REYNOLDS, J.

This case arises under the school laws of the State of Illinois. Ethel Smith, the plaintiff, was a teacher at the Lerma Grade School, Lerma, Illinois, a part of the Community Unit School District Number 1 of Coles and Cumberland Counties. She had held this position for 9 years, and had been teaching for 16 years. Her duties were to teach the third and fourth grades of the school, both grades being in one room. On March 13, 1957, the Board of Education of the school district met and adopted unanimously a motion to dismiss Mrs. Smith from her teaching duties in the district,

Abstract

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1. The first part of the report deals with the general situation of the school system in the district.

2. The second part of the report deals with the results of the various projects carried out during the year.

3. The third part of the report deals with the financial situation of the school system.

4. The fourth part of the report deals with the personnel situation of the school system.

5. The fifth part of the report deals with the physical situation of the school system.

6.

7. The sixth part of the report deals with the results of the various projects carried out during the year.

8. The seventh part of the report deals with the financial situation of the school system.

9. The eighth part of the report deals with the personnel situation of the school system.

This report deals with the general situation of the school system in the district. It covers the results of the various projects carried out during the year, the financial situation, the personnel situation, and the physical situation of the school system. The report is divided into eight parts, each dealing with a different aspect of the school system. The first part deals with the general situation, the second with the results of the projects, the third with the financial situation, the fourth with the personnel situation, the fifth with the physical situation, and the remaining three parts deal with the results of the projects, the financial situation, and the personnel situation respectively.

effective at the close of the school term June 4, 1957, for the reason that, in the opinion of the board, the best interests of the schools required it, and for the further reasons that she had failed to properly control classes under her jurisdiction and that discipline in her classroom was and has been of such a nature as to constitute incompetence and to make the dismissal necessary for the good of the school. The motion further stated that the matters in the motion had been brought to the attention of Mrs. Smith without effect, and that in the opinion of the Board, the causes upon which the dismissal was based were not remediable.

Before the dismissal notice was mailed to Mrs. Smith, at his request she met with Mr. Glenn J. Johnson, director of elementary education of the schools, and they discussed the possibility of her resigning as a teacher. No agreement was reached and the dismissal notice was mailed and Mrs. Smith received the notice on April 1, 1957. Mrs. Smith, in a letter to the board, requested and was granted a public hearing which was held by the Board of Education on May 9, 1957. At the conclusion of this public hearing, the Board of Education passed a resolution confirming its resolution of dismissal of Mrs. Smith of March 12, 1957, the second or confirming resolution finding that the best interests of the school district required her dismissal, and that Mrs. Smith had failed to properly cooperate with the administrators of the school district, and had an antagonistic

effective at the close of the school term June 4, 1937, for the reason that, in the opinion of the board, the best interests of the schools required it, and for the further reasons that she had failed to properly control classes under her jurisdiction and that discipline in her classroom was and had been of such a nature as to constitute an interference and to make the dismissal necessary for the good of the school. The school further stated that the matters in the action had been brought to the attention of Mrs. Smith without effect, and that in the opinion of the board, the reasons upon which the dismissal was based were not correctable.

Before the dismissal notice was mailed to Mrs. Smith, at his request she met with Mr. Glenn J. Johnston, director of elementary education of the school, and they discussed the possibility of her resigning as a teacher. As a result it was reached and the dismissal notice was mailed to Mrs. Smith.

Received the notice on April 1, 1937. Mrs. Smith, in a letter to the board, requested and was granted a brief hearing which was held by the board of education on May 3, 1937. At the conclusion of this public hearing, the board of education passed a resolution confirming its resolution of dismissal of Mrs. Smith of March 15, 1937, the record on confirming resolution finding that the best interests of the school district required her dismissal, and that Mrs. Smith had failed to properly cooperate with the administrators of the school district, and had an antagonistic

and hostile attitude toward them, and further that she had failed to properly control classes under her jurisdiction and that discipline in her classroom was of such nature as to constitute gross incompetence and to make such action necessary for the good of the school, and further that said causes of dismissal were not remediable. Notice of the action of the board of May 9, 1957 was mailed and received by Mrs. Smith on May 16, 1957. Thereafter, in apt time, Mrs. Smith brought her complaint for administrative review in the Circuit Court of Cook County, Illinois. The Circuit Court reversed the administrative decision of the Board of Education on the grounds that the findings and decision of the Board of Education were manifestly against the weight of the evidence. From the judgment of the Circuit Court, the Board of Education has appealed to this court.

While it is admitted and conceded by both parties that there are no questions of pleading or procedure presented by this appeal, the plaintiff does raise in her appeal, the question of jurisdiction, based upon Section 24-3 of Chapter 122, Illinois Revised Statutes. That section in part says: "Before service of notice of charges on account of causes that may be deemed to be remediable, the teacher shall be given reasonable warning in writing, stating specifically the causes, which, if not removed, may result in charges."

and hostile attitude toward them, and further that she had failed to properly control classes under her jurisdiction and that discipline in her classroom was of such nature as to constitute gross incompetence and to make such action necessary for the good of the school, and further that such causes of dismissal were not remediable. Verdict of the action of the board of May 9, 1937 was denied and received by Mrs. Smith on May 16, 1937. Thereafter, on May 17, 1937, Mrs. Smith brought her complaint for declarative relief in the Circuit Court of Cook County, Illinois. The Circuit Court reversed the administrative decision of the board of education on the grounds that the findings and decision of the board of education were manifestly against the weight of the evidence. From the judgment of the Circuit Court, the board of education has appealed to this court.

While it is admitted and conceded by both parties that there are no questions of fact, or issues presented by this appeal, the plaintiff does raise on her appeal, the question of jurisdiction, raised upon section 4-3 of Chapter 122, Illinois Revised Statutes. That section 4-3 says: "Before service of notice of charges on a count of charges that may be deemed to be remediable, the teacher shall be given reasonable warning in writing, stating specifically the causes which, if not removed, may result in charges."



This question of jurisdiction was not raised before the board or in the Circuit Court, and is raised here for the first time, but since the question of jurisdiction can be raised at any time, it must be considered in any determination of this matter. The question raised, namely the necessity of notice to the teacher, is confined to those causes which are remediable.

Certain specific causes are set forth in the motion to dismiss. These causes, in the form of charges, are, (1) that the best interests of the school district require the dismissal of Mrs. Smith; (2) Mrs. Smith had failed to properly cooperate with the administrators of the district, and had an antagonistic and hostile attitude toward them; (3) Mrs. Smith had failed to properly control classes under her jurisdiction and that discipline in her classroom was of such nature as to constitute gross incompetence and to make such action necessary for the good of the school; (4) that said causes for dismissal were not remediable.

The Board of Education has the power to dismiss a teacher for incompetency, cruelty, negligence, immorality, or other sufficient cause. Article 6-30 of Chapter 122, Illinois Revised Statutes. It also has the power to dismiss a teacher whenever, in its opinion, that teacher is not qualified to teach, or whenever, in its opinion, the interests of the schools require it. Article 7-16 of Chapter 122, Illinois Revised Statutes.

[illegible]

The Teacher Tenure Law, Article 24, Sections 24-1 -24-8, Illinois Revised Statutes, while it does not take away from the Board of Education any of its power to dismiss for cause, does spell out the procedure for the dismissal of a teacher after she acquires tenure status.

The trial court held that the decision and findings of the Board were against the manifest weight of the evidence, as contained in the transcript, and reversed the administrative decision of the Board of Education.

The scope of the inquiry that can be made by a reviewing court in an administrative review matter has been well set out in the case of Community Unit School District v. County Board, 9 Ill. App. 2d 116. As said in that case at page 119, "Section 11 of the latter Act (Ill. Rev. Stat. 1953, chap. 110, par. 274) directs that every action to review such a decision by the courts shall extend to all questions of law and fact presented by the record made by the administrative agency (in this case the trustees) and the findings and conclusions of such agency shall be held to be prima facie true and correct. These provisions for review have been construed to mean that the courts do not have the power to conduct a hearing de novo, nor to reweigh the evidence, but have only the duty to review the record to see whether the findings and decision of the administrative agency are supported by competent evidence. (Harrison v. Civil Service Commission of Chicago, 1 Ill. 2d 137; Stricklin v. Annunzio, 413 Ill. 324; Secaur v. Illinois State Civil Service Commission, 408 Ill. 197.)"

The Teacher's Union, Article 24, Section 24-1-24-2, Illinois Revised Statutes, while it does not take away from the Board of Education any of its power to dismiss for cause, does spell out the procedure for the dismissal of a teacher. This procedure requires certain steps.

The trial court in this case held that the Board of Education was required to follow the procedure set forth in the statute, and that the administrative action of the Board in this case was illegal.

The scope of the hearing was held to be a review of the facts in an administrative hearing. The Board of Education in the case of Board of Education v. Remick, 111 Ill. App. 3d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

directs that every action taken by the Board of Education shall extend to all members of the Board of Education and the findings and conclusions of such agency shall be held to be prima facie true and correct. These provisions for review have been construed to mean that the courts do not have the power to conduct a hearing de novo, nor to review the evidence, but have only the duty to review the record to see whether the findings and decision of the administrative agency are supported by competent evidence. (Remick v. Board of Education of Chicago, 111 Ill. App. 3d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Thus, we have no right or power to value or weigh the evidence. We can only determine whether the findings and decision of the Board are supported by competent evidence. We cannot sift the evidence, pro and con and determine which is entitled to the greater credence. We can only search the record and determine whether such record has such evidence as will support the findings of the administrative agency. If there is such evidence, neither the trial court or this court has the power to override or substitute its opinion as to questions of fact presented by such record and decided by the administrative agency. This doctrine of law has been pronounced by our courts so many times that citation of authorities is almost a waste of space in our reports.

It is only where the decision of the administrative agency is without substantial foundation in the record or is manifestly against the weight of the evidence that the decision will be set aside. Community Consol. School Dist. v. County Board, 7 Ill. App. 2d 98; Brezner v. Civil Service Commission, 398 Ill. 219; Oswald v. Civil Service Commission, 406 Ill. 506; Meridith v. Board of Education etc., 7 Ill. App. 2d 477; Pearson v. Board of Education, 12 Ill. App. 2d 44.

On the other hand, the courts are not bound to place the stamp of approval upon the decisions of an administrative agency merely because the said agency heard the witnesses and made the requisite findings. As said in the case of Oakdale School Dist. v. Trustees, 12 Ill. 2d 190, at page 195, "The

Thus, we have no right or power to value or weigh the evidence. We can only determine whether the facts and decision of the board are supported by competent evidence. We cannot sift the evidence, but we can determine which is entitled to the greater credence. We can only search the record and determine whether such record is such evidence as will support the findings of the administrative agency. If there is such evidence, whether the trier of fact has the power to override or substantiate the opinion as to questions of fact presented by an agency is decided by the administrative agency. This doctrine of law has been pronounced by our courts on many times the rights of administrative agencies is almost a waste of space to our reports. It is only where the decision of the administrative agency is without substantial support in the record that the courts will go against the weight of the evidence that the decision will be set aside. Community Council, School Board, v. County Board, 7 Ill. App. 2d 98; Greiner v. Civil Service Commission, 398 Ill. 219; David v. Civil Service Commission, 408 Ill. 506; Verdith v. Board of Education, 7 Ill. App. 2d 477; Peerson v. Board of Education, 12 Ill. App. 2d 44. On the other hand, the courts are not bound to place the stamp of approval upon the decision of an administrative agency merely because the said agency heard the witnesses and made the requisite findings. As said in the case of Abdel School Dist. v. Trustees, 17 Ill. 2d 190, at page 195, "The

rule which accords a prima facie validity to administrative decisions does not relieve a court of the important duty to examine the evidence in an impartial manner and to set aside an order which is unsupported in fact. It is unnecessary for this court to advert to the dangers inherent in a relaxation of this function. They have recently been ably pointed out in Winder, A Twentieth-Century Problem: Administrative Law in Great Britain, 43 U.S.A.J. 621 (July, 1957). Our Administrative Review Act does not require judicial recognition of an order which is against the manifest weight of the evidence, 'nor does the law allow a stamp of approval to be placed on the findings of an administrative agency merely because such agency heard the witnesses and made the requisite findings.' Brezner v. Civil Service Com. 398 Ill.<sup>219</sup>/231."

Conforming to the rule laid down in so many cases that the court has no right to reweigh the evidence and can not under the Administrative Review Act disturb the findings of fact made by an administrative agency and the discretion exercised by it unless manifestly against the weight of the evidence, and at the same time, mindful of the law as set forth in the Oakdale School District case, and in the Brezner v. Civil Service Commission case, it is the duty of this court to consider the record to determine if the findings of the Board of Education are borne out by the evidence in the cause, and whether or not the findings are against the manifest weight of the evidence or

[illegible]



if there is substantial evidence in the record to support the findings. This is true as to the finding of the Board as to whether or not the causes or charges against Mrs. Smith were remediable. In the case of Meridith v. Board of Education etc., 7 Ill. App. 2d 477, it was held that the School Security Law, being in derogation of the common law and creating a new liability should be strictly construed in favor of the board of education, citing the case of Onahco v. Board of Education, School Dist. No. 303, 346 Ill. App. 2d 1, and the court in the Meridith case reiterates the doctrine that courts of review can not under the Administrative Review Act disturb the findings of fact made by the board and the discretion exercised by it unless manifestly against the weight of the evidence. The Meridith case was a case involving the question as to whether or not the charges against the teacher in that case were remediable. Yet, the Meridith case, while conceding that the Board of Education had the right to determine in the first instance, that the causes resulting in charges were not remediable, by implication at least, reiterates the right of the reviewing court, on final hearing to determine whether or not the action of the board was proper. In other words, the board determines in the first instance whether or not the causes were remediable and the trial court, under the authority of the Administrative Review Act, makes the final determination as to whether or not the causes assigned for dismissal were remediable.

if there is substantial evidence in the record to support the findings. This is true as to the finding of the board as to whether or not the charges or charges against a teacher were remediable. In the case of Boyd v. Board of Education, 7 Ill. App. 3d 477, it was held that the school board was not being in violation of the common law of testing a new finding shall be strictly confined in a way of the board at education, as in the case of Boyd v. Board of Education, 7 Ill. App. 3d 477, 310 Ill. App. 3d, and the court in the Boyd case reiterates the doctrine that courts in review can not under the administrative review of district board of education of fact made by the board in the district, reversed by it unless manifestly and to the weight of the evidence. The Boyd case was a case involving the question as to whether or not the charges against the teacher in that case were remediable. Yet, the Boyd case, while so well of the Board of Education had the right to select a new list in place, that the charges against a teacher were not remediable, by implication at least, retained the right of the reviewing court, a final court of review, whether or not the action of the board was proper. In other words, the board determines if the charges against a teacher or not; the charges were remediable and the final court, under the authority of the administrative review act, may find the charges as to whether or not the charges assigned for dismissal were remediable.

The Board of Education by its adoption of the dismissal resolution, found, as a matter of fact, that the charges contained in the dismissal resolution were true. They also found that the causes were not remediable. But an examination of the original resolution discloses that the resolution is based upon the causes set forth therein, namely, that Mrs. Smith had failed to properly control her classes and that discipline in her classroom was such as to constitute incompetence. On those causes, the resolution that her dismissal was for the good of the school is predicated. Specifically, then, the charge was that she did not properly control her classes and the discipline in her classes, and using this as a spineboard basis, the Board then decided as a matter of fact, that her dismissal was for the good of the school. Referring again to the statute spelling out the procedure where the causes are remediable, Section 24-3 of Chapter 122, Illinois Revised Statutes, provides that "before service of notice of charges on account of causes that may be deemed to be remediable, the teacher shall be given reasonable warning in writing, stating specifically the causes, which, if not removed, may result in charges." The same section provides that any teacher may be removed or dismissed for the reasons or causes provided in Sections 6-36.

Taking the proceedings of the Board of Education in the order in which they occurred, the first action of the Board was the act of the Board on March 12, 1957, when it adopted

The Board of Education by its adoption of the dismissal resolution, found, as a matter of fact, that the charges contained in the dismissal resolution were true. They also found that the charges were not remediable. But an examination of the original resolution discloses that the resolution is based upon the charges set forth therein, namely, that the teacher had failed to properly control her classes and that discipline in her classrooms was such as to constitute a menace to the good order of the school. The resolution that her dismissal was for the purpose of the school in providing discipline. The charges were that she did not properly control her classes and the discipline in her classes, and using this as a justification, the Board then decided as a matter of fact, that her dismissal was for the good of the school. The charges were that she was neglecting out the procedure where the charges are remediable, Section 24-3 of Chapter 122, Illinois Revised Statutes, provides that "before service of notice of charges on a teacher in cases that may be deemed to be remediable, the teacher shall be given reasonable warning in writing, stating specifically the charges, which, if not removed, may result in charges." In such section provides that any teacher may be removed or dismissed for the reasons or causes provided in sections 24-3. Listing the proceedings of the Board of Education to the order in which they occurred, the first action of the Board was the act of the Board on March 11, 1957, when it adopted

a motion to dismiss Mrs. Smith from her teaching duties in the district, effective at the close of the school term for the reason that in the opinion of the board, the best interests of the schools required it, and for the further reasons that she had failed to properly control classes under her jurisdiction and that discipline in her class room was and had been of such a nature as to constitute incompetence and to make the dismissal necessary for the good of the school. After a public hearing at the request of Mrs. Smith, held May 9, 1957, the board confirmed its previous resolution of dismissal, and in the second resolution, added some additional grounds, namely, that Mrs. Smith had failed to properly cooperate with the administrators of the school district, and had an antagonistic and hostile attitude toward them. In both resolutions the board held the causes of dismissal were not remediable.

If the causes of dismissal were remediable, the written notice or warning, stating specifically the causes which, if not removed, may result in charges, is mandatory. If they were not remediable, such written notice or warning is not required. This court in passing upon the question, must determine whether or not the causes were remediable or not remediable. Reduced to its essentials, the first charges against the teacher, namely the charges before the board on March 17, 1957, were that Mrs. Smith had failed to properly control classes under her jurisdiction and that discipline in her classroom was of such nature as to constitute incompetence and to make the

a motion to dismiss Mrs. Smith from her teaching duties in the district, effective at the close of the school term for the reason that in the opinion of the board, the best interests of the schools required it, and for the further reason that she had failed to properly control classes under her jurisdiction and that discipline in her class room was not in line with the nature as to constitute incompetence and to make the dismissal necessary for the good of the school. After a public hearing at the request of Mr. Smith, held May 11, 1937, the board confirmed the previous resolution of dismissal, and the second resolution, added some additional reasons, namely, that Mr. Smith had failed to properly cooperate with the administrators of the school district, and that his disposition and hostile attitude toward them, in both respects a loss of confidence in the cases of dismissal were not remediable.

If the action of the board with respect to this, the written notice or warning, at this point, the action which, if not removed, may result in suspension, is satisfactory. If they were not remediable, such written notice or warning is not required. This court in passing upon the question, must determine whether or not the causes were such as to be remediable. If not remediable, to the satisfaction, the first charges against the teacher, namely the charges before the board on March 11, 1937, were that Mr. Smith had failed to properly control classes under her jurisdiction and that discipline in her classroom was of such nature as to constitute incompetence and to make the

dismissal necessary for the good of the school. The charges "incompetency" or "for the best interests of the school" are general, while the specific charge against Mrs. Smith was lack of control and discipline in her classes.

In determining this matter, we must differentiate between the words "charges" and "causes". The causes set forth in the Statute, Sections 6-36 and 7-16 are general in their nature. They must be fortified and backed up by specific charges, such as lack of control or failure to exercise discipline. It must be recognized that some of the causes are by their very nature not remediable. Others, by their very nature would be remediable. Lack of control, or failure to require discipline, should fall in the latter category. There is no question that the teacher, or any teacher, being notified that her control of her classroom was inadequate or that the discipline in her classroom was lax and not up to the standards required by the Board of Education, could very easily remedy that condition, by tightening the control over her pupils, and enforcing discipline.

We must therefore hold, that the causes of dismissal against Mrs. Smith, which resulted in the charges before the board, were remediable, and being remediable, the board had no authority to dismiss the teacher, without first giving her written warning, stating the causes, which, if not removed

discipline necessary for the good of the school. The charges  
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general, while the specific charges against Mrs. Smith are lack  
of control and discipline in her classes.

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the words "charges" and "causes". The causes set forth in the  
Statute, Sections 6-35 and 7-15 are general in their nature.

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should fall in the latter category. There is no question that

the teacher, or any teacher, being notified that her control  
of her classroom was inadequate or that the discipline in her  
classroom was lax and set up to the standards required by the  
Board of Education, could very easily remedy the situation,  
by tightening the control over her pupils, and correcting  
discipline.

We must therefore hold, that the causes of discipline  
against Mrs. Smith, which resulted in the charges before the  
Board, were remediable, and being remediable, the Board had  
no authority to dismiss the teacher, without first giving her  
written warning, stating the causes, and, if no removed



would result in charges. This was not done and no opportunity was afforded her, under the statute, to remedy or correct the causes which resulted in her dismissal.

It is true that the statute uses the words "causes which may be deemed to be remediable", and that the board by its resolutions determined that the causes were not remediable, but that is only a determination of a matter by the board, which is reviewable by courts under the Administrative Review Act, as provided by Section 74-3 of the School Act.

We hold that the causes assigned in the resolution dismissing Mrs. Smith, namely lack of control in her classroom and lack of discipline were remediable causes, and that under the Statute, before any action to dismiss could be instituted, she was entitled to written warning, which in this case was not given. The action of the Board of Education, under the facts disclosed herein, cannot be sustained. The judgment of the Circuit Court reversing the action of the Board of Education is affirmed.

affirmed.

Roeth, P. J. and Carroll, J. concur

1. The first part of the report is a summary of the work done during the year. This includes a description of the project, the objectives, and the results achieved.

1. 1. 1. 1. 1.

Boeth, P. J. and Carroll, J. Connor

411  
47552

GEORGE KELRICK doing business as  
NATIONAL JEWELRY CO.,

Plaintiff - Appellee,

v.

HANNAH L. KOPLIN, HARRY KOPLIN, and  
GLENCOE NATIONAL BANK, a corporation,

Defendants,

HANNAH L. KOPLIN and HARRY KOPLIN,

Defendants - Appellants.

A  
INTERLOCUTORY APPEAL

FROM SUPERIOR COURT

COOK COUNTY.

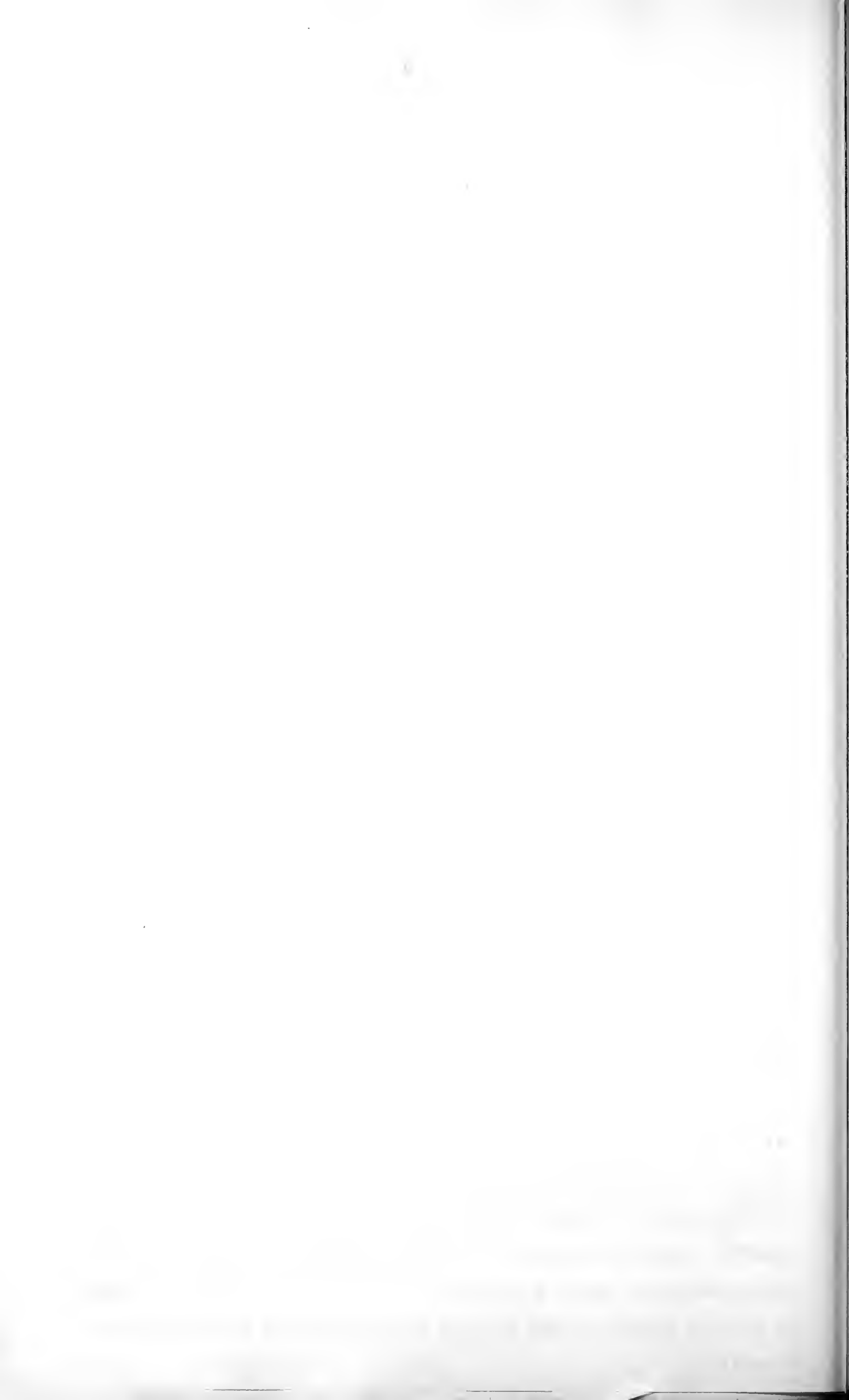
19 I.A. 301<sup>2d</sup>

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is a suit in Equity seeking a temporary injunction. The injunction issued without notice and without bond the day after the suit was filed, restraining the defendants Hannah L. and Harry Koplin from entering into a safety deposit box registered in their names and enjoining defendant Glencoe National Bank from permitting removal of the contents of the safety deposit box by the Koplins.

The bank answered. The Koplins filed a motion to dissolve the temporary injunction which was denied. The Koplins have appealed from the order denying the motion. See § 78 Illinois Civil Practice Act.

The facts as stated by the complaint indicate plaintiff is in the jewelry business in New York City. The Koplins, customers of plaintiff, took some jewelry for inspection under a memorandum which provided for its return upon plaintiff's demand. Hannah L. Koplin left New York City on August 7, 1957 and refused to return plaintiff's jewelry. Plaintiff instituted a suit in January, 1958 in Dade County, Florida to recover his jewelry.



The complaint also alleges that Hannah L. Koplin is insolvent and unless she is restrained from disposing of the property it will be lost. It is further alleged that the taking of the jewelry was a scheme to defraud plaintiff and he will suffer irreparable injury unless defendants are restrained from entering the safety deposit box and the bank enjoined from permitting the Koplins to make entry into the box and remove the contents thereof.

The defendants contend that the complaint fails to allege facts which justify issuance of an injunction without notice and without bond.

In the recent case of Tri Square Realty Corp. v. Bressler, 17 Ill. App. 2d 336, this court pointed out that: "The sufficiency of the complaint is the test of the validity of the injunction order." A statement of a conclusion in a complaint is not sufficient to make it appear that the complainant will be unduly prejudiced if the injunction is not issued without notice. It must appear from the facts recited that the plaintiff will be unduly prejudiced before the injunction can be granted. Lee v. Morris, 326 Ill. App. 555; Grossman v. Grossman, 304 Ill. App. 507; Thulin v. National Ice & Fuel Corp., 293 Ill. App. 155. The law does not favor granting injunctions without notice. Brin v. Craig, 135 Ill. App. 301.

The requirement of notice under the Statute, Ill. Rev. Stat., 1957, ch. 69 §3, is mandatory and the provision permitting dispensing with notice under certain circumstances is to be strictly construed. The extraordinary remedy of injunction



-3-

without notice should not be allowed except in extreme cases. 21 I. L. P., Injunctions, page 624. There must be facts to support plaintiff's statement that he will be unduly prejudiced unless the injunction is granted without notice. Balaban & Katz v. Rose, 283 Ill. App. 615. The same rules apply to injunctions issued without bond. When notice or a bond is required and not given:

. . . then it is the duty of this court, aside from any other question and without reference to the merits of the cause as made by the averments of the complaint, to reverse the order denying the motion to dissolve the injunction on that ground. Kessie v. Talcott, 305 Ill. App. 627, 634.

To the same effect are Sonney Amusement Enterprises, Inc. v. Astor Entertainment Company, Inc., 339 Ill. App. 275 and Lange v. Massachusetts Mutual Life Ins. Co., 273 Ill. App. 356.

From a careful examination of the complaint we are compelled to hold the temporary injunction was improvidently issued without notice and without bond.

In the light of these principles and decisions it is unnecessary to consider the other points raised.

It is therefore ordered that the temporary injunction be dissolved.

INJUNCTION DISSOLVED.

MURPHY AND KILEY, JJ., CONCUR.

ABSTRACT ONLY.





IN THE  
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT  
Second Division

May Term, A.D. 1958

19 I.A. 302

WILLIAM E. FAY and JOSEPH D. TALBOT,  
Trust Managers of the Adam Block Liqui-  
dation Trust created in reorganization  
proceedings of the Adam Block Corporation,  
an Illinois corporation, Debtor, by  
appointment of the United States District  
Court, Eastern Division, in Cause No.  
71923,

Plaintiffs-Appellants

vs.

MONTGOMERY WARD & CO., INCORPORATED, an  
Illinois Corporation,

Defendant-Appellee

Appeal from

the Circuit Court of

Will

County

SOLFISBURG - J.

This appeal involves a suit brought in the Circuit Court of Will County for the recovery of additional rents under a percentage lease. No questions are raised on the pleadings. The facts are all undisputed with but few exceptions. The complaint, the amended and supplemental complaint and answers thereto came on for hearing before the Master in Chancery to whom the cause had been referred, and he found the issues for the defendant and against the plaintiffs. Objections to the Master's report, which were overruled, were allowed to stand as exceptions thereto and, after argument thereon, were overruled, and the Circuit Court entered a decree approving the Master's report and dismissing plaintiffs' complaint for want of equity. From that decree this appeal was taken.

The lease in question was dated September 10, 1946. Under its terms plaintiffs, trust managers in reorganization proceedings in the United States



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District Court, leased to defendant Montgomery Ward & Co., Incorporated, (sometimes referred to as Ward) the entire premises at 101-109 Ottawa Street, Joliet, Illinois. The premises consisted of two adjoining buildings known as the North Building and the South Building in downtown Joliet. Ward had operated a store in the South Building since 1929 under a prior lease. It did not go into possession of both buildings under the new lease until October 1, 1948, when Sears Roebuck & Co., moved from the North Building to new quarters.

The facts concerning Ward's occupancy are not in dispute. The South Building consisted of basement, first floor, mezzanine and second floor, comprising about 34,600 square feet of usable area, and Ward used the entire South Building for retail sales. The North Building consisted of basement, first floor and second floor and comprised about 18,300 square feet of usable floor space. Thus, the North Building contained only a little more than one half the usable floor space found in the South Building. Ward used about 25% of the available area in the premises for the storage of goods held for sale in the store and that consisted of the entire second floor and basement of the North Building. The remainder of the space in both buildings was devoted to the sale of merchandise, although at times portions of the first floor of the North Building were used for storage. It is Ward's failure to use the entire North Building for retail sales upon which the plaintiffs base their complaint. Plaintiffs contend that the lease and the parties thereto contemplated that Ward would use the entire North and South Buildings for retail sales and that any warehouse space would be secured in other buildings; that if Ward failed to use any part of the demised premises for merchandising, the lease requires Ward to pay a percentage rental based upon the average monthly percentage rental paid by Ward and Sears and Roebuck on the two buildings. Ward admittedly paid percentage rent based on all sales made by it in the premises and in an outside service station operated in conjunction with the premises.



Over the term of the lease in controversy the yearly rental averaged \$32,904.74. In no lease year did Ward ever pay merely the minimum \$20,000 rental.

Prior to Ward's occupancy of the North Building, that building had been leased by plaintiffs to Sears, Roebuck & Company for a retail store. Sears, Roebuck had paid a minimum annual rental of \$8,400 plus a percentage of net sales. At the same time Ward paid a percentage rental on the South Building of  $2\frac{1}{2}\%$  of net sales with a minimum rent of \$9,500 per year. Therefore, prior to Ward's occupancy of both buildings the combined minimum annual rentals on the two stores amounted to \$17,900. In fact, more than the minimum rentals were paid in every year by both tenants. Since the lease years in the two instances are not coincidental, comparison is possible but difficult. From 1940 to 1946 (the year of consummation of the lease in question) rentals on the South Building advanced from \$11,810 to \$22,714, while from 1943 through 1946 rentals on the smaller North Building, then demised to Sears, Roebuck, advanced from \$11,596 to \$22,653. The minimum annual rental called for under the lease in question was \$20,000, but the rentals paid on the combined premises under the lease here involved were as follows:

Year ended 6/30/49	\$35,681.40
Year ended 6/30/50	32,076.80
Year ended 6/30/51	37,178.30
Year ended 6/30/52	31,750.80
Year ended 6/30/53	31,791.96
Year ended 6/30/54	28,722.94
Year ended 6/30/55	33,130.98
Total	<u>\$ 230,333.18</u>
Average	\$ 32,904.74

We deem it essential to an understanding of this case to set forth verbatim paragraphs 1, 6a, 13, 22 and 23 of the lease agreement. The lease, which was a ten year lease with four 5-year options to renew upon the same terms and conditions, contained the usual preliminary paragraph, after which followed these pertinent paragraphs:

"1. The Landlord hereby leases to the Tenant, and the Tenant hereby hires from the Landlord, for the term of ten (10) years and no months, commencing on the first (1st) day of February, 1947, and continuing to and including the thirty-first (31st) day of January, 1957, the premises located in the City of Joliet, County of Will, and State of Illinois, described as follows:

Over the years, the Commission has received many suggestions for improvement.

These suggestions have been carefully considered and many have been adopted.

Some of the changes are:

1. The Commission has revised its rules and regulations to make them more understandable.

2. The Commission has revised its forms to make them easier to fill out.

3. The Commission has revised its procedures to make them more efficient.

4. The Commission has revised its policies to make them more fair.

5. The Commission has revised its methods of selecting members to make them more representative.

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30. The Commission has revised its methods of selecting members to make them more representative.



Lots Five (5) and Six (6) in Block  
Nineteen (19) Old Town of Joliet (Now  
City of Joliet) in Will County, Illinois

together with all improvements now or hereafter thereon and all appurtenances thereto, being the property now wholly or in part occupied by the Tenant and Sears, Roebuck & Company, and located and known as numbers 101-103-105-107-109 Ottawa Street."

"Abatement of Rent". "6a. If, as a result of damage to or destruction of the improvements on the demised premises due to fire or the elements, or as a result of the exercise of the right of eminent domain, or as a result of any other cause whatsoever (unless such other cause be the Tenant's negligence), the whole or any part of the premises shall become untenable, dangerous or unfit for the Tenant's use, or the Tenant lose the use of all or a portion of the premises, rent shall abate justly and proportionately during the continuance of such conditions."

"Assignment". "13. The Tenant may use the premises for any lawful purpose or may vacate or sublet all or any part of them, or assign this lease, but the Tenant shall not thereby be relieved of liability hereunder."

"Percentage Rent". "22. The Tenant shall pay a percentage rent hereunder in accordance with the following terms and provisions:

(a). The Tenant shall pay a percentage rental equal to two and one-half percent (2½%) of the gross retail sales (less exchanges, allowances, returns, carrying charges, sales or use taxes, and sales of merchandise purchased by customers ordering from a Ward mail order catalogue) made by the Tenant on the demised premises during each lease year. Percentage rent hereunder shall apply from the first (1st) day of February, 1947, and shall apply pro-rata for any period less than a lease year. Payments of percentage rent shall be made monthly on or before thirty (30) days after the close of each current month's business. At the time of paying percentage rent for the last month of any given lease year Montgomery Ward & Co., Incorporated, shall furnish a statement showing the computation of percentage rent for such lease year, which statement shall be deemed to have been accepted by and shall be binding upon the Landlord unless within three (3) months after it is furnished the Landlord shall cause applicable records to be audited, at the Landlord's expense, by a certified public accountant in a manner which does not unreasonably interfere with the conduct of the Tenant's business. Each successive twelve (12) month period beginning with the first (1st) day of February, 1947, shall be considered as a "lease year."

(b). Rent or other charges paid for space (herein sometimes called "outside space") not hereby leased, but used as part of the store, or used for storage of goods, or other purposes in conjunction with the store, may be deducted by the Tenant from percentage rent. If the Tenant uses outside space purchased by it, then there may be deducted by the Tenant in the same manner as such rent is deducted, an amount equal to five percent (5%) per year of the cost of such premises, plus eight per cent (8%) per year of the cost of any



alterations and improvements made by the Tenant in and about such premises, plus the amount of taxes and assessments levied against them and the cost to the Tenant of insurance carried on them. Should the Tenant make repairs, alterations or improvements, with respect to any outside space at any time leased by it, then there may be deducted from percentage rent, in the same manner as rent for outside space is deducted, an amount equal to eight percent (8%) per year of the cost of such repairs, alterations and improvements. Sales made in any space with respect to which deductions are made under the provisions of this paragraph (b) shall be added to sales under this section for the purpose of computing percentage rent. The total amount which may be deducted by the Tenant under the provisions of this paragraph (b) from percentage rent otherwise payable under this lease for any given lease year shall not exceed fifteen per cent (15%) thereof, provided, however, that during the first five (5) years of the term of this lease the total amount which may be deducted by the Tenant under the provisions of this paragraph (b) from percentage rent otherwise payable hereunder for any given lease year of such first five (5) years of the term shall not exceed the sum of Thirty-Six Hundred Dollars (\$3600.00).

(c). Rent or other charges paid by the Tenant for tire service, farm implement store, including space for display of machinery and for parking and filling station purposes in Joliet, Illinois, not hereby leased, but used for sales of merchandise or partly for sales as aforesaid and partly for warehouse purposes, may, at the Tenant's option, be deducted from percentage rent which would otherwise become payable hereunder. Sales made in any space with respect to which deductions are made under the provisions of this paragraph (c) shall be added to sales under this section for the purpose of computing percentage rent.

(d). Should the tenant vacate the entire premises or cease selling merchandise at retail therein while the premises are usable for the operation of a store or should it assign this lease or sublet all of the premises to anyone except a successor or a subsidiary or controlling corporation, then the average monthly percentage rental paid during the twenty-four (24) months or lesser period of occupancy preceding such event shall be taken as the monthly rate of percentage rental payable thereafter, subject to abatement as elsewhere provided.

(e). Should the Tenant operate a store in part of the premises and sublet a part, then the amount of the rent received from such subtenants less the cost of commissions, heat, light, janitor and elevator service, and alterations, decorations, repairs and other expense incident to such subletting, shall be multiplied by thirty-three and one-third ( $33\frac{1}{3}$ ) and the product thereof shall be added to the amount of sales in computing percentage rent.

(f). If the Tenant is required to pay a total tax, license or other charge because of the maintenance or operation of its places of business in the jurisdiction in which the premises are located greater than the aggregate amount which independent individuals each separately operating one of said places would be required to pay, then the Tenant may deduct from any percentage rent payable

1. The first of these is the fact that the Commission has not yet received any information from the Government of the Republic of China (Taiwan) regarding the situation in the region.

1. The first step is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

hereunder the proportionate share of the excess allocated to the business on the premises."

"Termination By Landlord in Certain Events."

"23. If the total rent paid by the Tenant for any given lease year of the term hereof, after the lease year ending on January 31, 1948, shall be less than Twenty Thousand Dollars (\$20,000.00), then the Landlord, at its election, may, within thirty (30) days after receipt of the Tenant's final payment of rent for such lease year, cancel this lease by notice in writing to the Tenant, as of a date which is one hundred and twenty (120) days subsequent to the date of the receipt of the Landlord's notice of cancellation by the Tenant, provided, however, that should the Tenant within sixty (60) days after receipt of the Landlord's said notice of cancellation, pay to the Landlord a sum which is sufficient to cover any deficiency if any, between the rent paid by the Tenant for such lease year and Twenty Thousand Dollars (\$20,000.00), then this lease shall remain in full force and effect the same as if the Landlord had not given any such notice of cancellation, but should the Tenant fail to pay any such deficiency, within sixty (60) days after receipt of a notice of cancellation of this lease as aforesaid this lease shall without any further act of either party be cancelled as of the termination date specified in the Landlord's notice of cancellation."

The principal contention of the plaintiffs was that Ward's use of the premises for other than retail sales purposes was not within the contemplation of the parties and that when Ward used a substantial part of the North Building for storage or warehouse purposes, it was required to pay, under the lease, a percentage rental measured by past performances" of Ward in the South Building and its predecessor, Sears, Roebuck, in the North Building. Otherwise stated, the plaintiffs contend that Paragraph 22(d) properly construed applies in the instant case where Ward used the greater part but not all of the premises for retail sales. In their Brief and Argument, plaintiffs argue that Ward's obligation to pay a percentage rental measured by the past performance of Ward and Sears, Roebuck is based, first, upon an express covenant in the lease appearing in Paragraphs 22(d) and 22(e) and, secondly, upon an implied covenant. Alternatively, plaintiffs urge that if the lease fails to provide for percentage rental measured by past performances in the event of any non-use of the premises for retail sales, then the plaintiffs have made out a proper case for reformation of the lease. No claim is made by the plaintiff trust

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managers that the use which Ward made of the North Building was in any manner improper or unlawful or that Ward's use in any way violated the terms of the lease. No claim is made by the plaintiffs that Ward diverted any of its Joliet retail business to any other location or discontinued any portion of its Joliet retail business during the term of the lease. This is not a case where the tenant has turned the premises into a warehouse, making only nominal sales from the premises. In the words of the plaintiffs, they urge this court to hold that under the lease "the discontinuance of retail selling" in the portions of the North Building "was essentially the same" as assigning, subletting, vacating or ceasing to sell in the entire premises.

Defendant's theory of the case, on the other hand, is that at all times Ward conducted a retail store on the premises, allocating the demised area between selling space and merchandise storage space according to its reasonable business judgment. Ward contends that the detailed lease agreement with its elaborate provisions for the payment of rent contains the entire agreement between the parties and that neither the lease agreement nor any extrinsic circumstances justify or permit increasing its rentals as contended for by plaintiffs. Defendant argues that the construction of the lease urged by plaintiffs is not a fair or reasonable one but, on the contrary, is strained. It is the defendant's position that the factual situation here does not authorize implying any such covenant as plaintiffs urge. Ward further contends that plaintiffs are not entitled to reformation or avoidance of the lease, as the evidence in the record was that the lease clearly embodies the agreement of the parties.

We have examined the evidence in this case with some care, and we find nothing in the record concerning any circumstances incidental or extrinsic to the lease which would lead to the conclusion that the lease





as drawn does not fully and accurately express the intentions of the parties. True, apart from the lease agreement itself, the record does not reveal what was in the contemplation of the parties with reference to use of the premises for storage and warehouse space. The testimony of defendant's Joliet store manager was that the amount of warehouse space required by a store varies, but that in Joliet, plumbing fixtures, furniture, stoves, television sets, building materials, gardening equipment, toys, overshoes and heavy winter clothing all required warehouse space and that delivery of these items must be anticipated twenty to thirty-five days in advance. He further testified that where warehouse space adjoins sales space, there are several advantages such as customer convenience, less shuttle trucking, savings in warehouse help, better inventory control. In the opinion of the manager, which was uncontradicted, the store was being used to its best advantage, and sales could not have been profitably expanded to the second floor and basement of the North Building because remodeling costs would have been great, additional personnel would have been required, additional inventory would have to have been ordered and outside warehouse space would then have been necessary. The manager testified that an additional expansion of the store's lines would produce a few more sales, but they would not be profitable sales. No contrary evidence on this subject was offered by plaintiffs.

There is evidence in the record with reference to the fair market value of the premises as it pertains to the fair rental of the premises. Plaintiffs' experts fixed the fair rental value of the premises at \$38,125.00 and \$40,000.00 gross per year, while the defendant's expert testified that in his opinion the rental value of the property was not more than \$22,500. The record reveals that the lease in question was signed after negotiations and conferences between the representatives

as drawn does not fully and accurately express the intentions of the parties. True, apart from the lease agreement itself, the record does not reveal what was in the contemplation of the parties when reference is made of the premises for storage and warehouse space. The testimony of defendant's Joliet store manager was that the amount of warehouse space required by a store varies, but that in Joliet, plumbing fixtures, furniture, above, television sets, clothing materials, general ing equipment, toys, overcoats and heavy winter clothing all required warehouse space and that delivery of these items must be anticipated twenty to thirty-five days in advance. He further testified that where warehouse space adjoins sales space, there are several advantages such as customer convenience, less handling involving, savings in warehouse help, better inventory control. In the opinion of the manager, which was uncontradicted, the store was being used as the home of a, and sales could not have been profitably expanded to the second floor and basement of the North Building because remodeling costs would have been great, additional personnel would have been required, and little inventory would have to have been ordered and certain warehouse space would then have been necessary. The manager testified that an additional expansion of the store's lines would produce a few more sales, but they would not be profitable sales. In contrast, evidence on this subject was offered by plaintiffs. There is evidence in the record with reference to the fair market value of the premises as it pertains to the fair rental of the premises. Plaintiffs' experts fixed the fair rental value of the premises at \$38,125.00 and \$40,000.00 gross per year, while the defendant's expert testified that in his opinion the rental value of the property was not more than \$22,500. The record reveals that the lease in question was signed after negotiations and conferences between the representatives

of Ward and the plaintiffs and their attorney, and after notice to the beneficiaries under the plaintiffs' trust and after approval of the terms of the lease by the United States District Court. All these preliminary actions covered a period from December, 1945, to the time of the signing of the lease in September, 1946. Prior to execution of the lease, the beneficiaries under the trust were notified by the plaintiff trust managers that Ward desired to lease the North Building in addition to the South Building, and under the terms of the proposed lease Ward was to pay an annual minimum rental of \$20,000 which amount, according to the notice to the beneficiaries, exceeded an annual gross rental return in excess of 10% of the total indebtedness evidenced by the outstanding certificates of beneficial interest. As previously noted, the record reveals that defendant Ward has paid to the plaintiffs under the terms of the lease from 1948 to 1955 an average annual net rent of \$32,904.75.

Examination of the lease reveals that neither Section 1 nor Section 13 therein, contains any restrictive statement concerning the purpose for which the premises may be used or occupied. Section 13 provides the tenant may use the premises for any lawful purpose or may vacate or sublet all or any part, or assign the lease, and the tenant shall not thereby be relieved of liability thereunder. Section 22(a) provides that the tenant pay percentage rent of  $2\frac{1}{2}\%$  of "gross retail sales" (less certain items specified in the lease) made by the tenant on the demised premises during each lease year. Section 22(b) permits charges paid for "outside space" not demised under the lease agreement, but used as part of the store or for storage or other purposes in conjunction with the store to be deducted by the tenant from percentage rent, provided that sales made in such outside space are added to the sales subject to percentage rent. Section 22(c) of the lease also authorizes deductions from percentage rent of charges

[illegible]

paid for tire service and similar outside space used for sales of merchandise or partly for sales and partly for warehouse space, provided that sales made in such outside space are added to the sales subject to percentage rent.

Section 22(d) provides that should the tenant vacate the entire premises or cease selling merchandise at retail therein, while the premises are usable for the operation of the store, or should it assign the lease or sublet all the premises to anyone except a successor or subsidiary or a controlling corporation, the average monthly percentage rental paid during the 24 months or lesser period of occupancy preceding such event, shall be taken as the monthly rate of percentage rental, payable thereafter subject to abatement as provided elsewhere in the lease.

Section 22(e) provides that should the tenant operate a store in part of the premises and sublet a part, then the amount of rent received from such subtenants (less the cost of commissions, heat, light and certain other specified items incident to such subletting) shall be multiplied by  $33\frac{1}{3}\%$  and the product thereof added to the amount of sales in computing percentage rent.

41  
Plaintiffs argue that Sections 22(b) and (c) require the defendant to use outside space for its warehouse and storage space needs. We cannot agree with this construction, since the most that can be attributed to the language of Sections 22(b) and 22(c) is that those provisions allow or permit Ward to use outside storage space and have the cost thereof and the retail sales derived therefrom brought within the percentage rent provisions of the lease. The most that can be said is that Sections 22(b) and (c) constitute some recognition of the parties that warehouse space is necessary to a store and that the landlord who shares in the store's profits should properly share in the expense of

[illegible]

such space.

Section 22(d)-upon which plaintiffs must rely heavily-concerns itself with possible cessation of the tenant's business in the entire premises either by vacating the premises, by ceasing entirely to sell merchandise therein, or by assigning or subletting in toto. Admittedly, Ward has never done any of these things. Section 22(e) is the only section of the lease dealing specifically with the situation in which the tenant operates a store in part of the premises only and sublets a part. No contention is made that Ward has sublet any part of the store. In short, plaintiffs fail to point out and we fail to find any provision in the lease which can be said to contain an express covenant on the part of the tenant to pay a percentage rental based on past performance where some portion of the premises is used for storage or warehouse purposes.

If plaintiffs are to succeed, they must succeed on the basis of an implied covenant in the lease obligating the tenant to pay a percentage rental based upon past performances where it fails to use all or substantially all the premises for actual retail sales. We are compelled to conclude that there is no such implied covenant here. The plaintiff trust managers rely principally on two cases. The first of these cases is Fox v. Fox Valley Trotting Club, 8 Ill. 2d 571. There plaintiff, owner of the race course known as Aurora Downs, leased the track to the defendant trotting club for a base rental of \$25,000 per year, payable in all events, plus varying percentages of gross receipts from amounts wagered, admissions, and revenues from concessions. During the term of the lease, the defendant found it more profitable to make a new lease at another race track, Maywood Park, and to stage its racing meets there. When the defendant refused to pay more than the base rental of \$25,000 per year, the plaintiff sought to recover for the loss

such space.

Section 82(-) - upon which Plaintiff has relied.

It is all the Plaintiff's contention that the defendant's

conduct of the business of the defendant's

business has been such that the defendant's

business has never been able to pay its

debts to the plaintiff's creditors.

With the defendant's conduct in mind, the plaintiff

has been forced to pay the defendant's

debts to the plaintiff's creditors.

It is the plaintiff's contention that the defendant's

conduct of the business of the defendant's

business has been such that the defendant's

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in rent under the percentage rental provisions of his lease. The Supreme Court of Illinois held that the plaintiff had a cause of action and that the defendant had committed a breach of an implied covenant in the lease agreement. Not only are the facts in the Fox case obviously distinguishable from the facts in the instant case, but the rationale of the decision in the Fox case is not applicable here. In the Fox case, the tenant abandoned its business operations at the demised premises and diverted its business elsewhere, thereby depriving the landlord of the largest part of his rental income. In the present case, Ward operated no other store in the Joliet area and neither diverted any departments or lines of its business to other locations nor discontinued the same. In the Fox case, the tenant sought to limit its liability for rent to the base rent of \$25,000 per year. In the instant case, Ward has in each lease year paid substantially more than the base rental. In the Fox case, the \$25,000 base rent was only a nominal rental, being approximately one-fifth or one-sixth of the fair rental of the premises. In the present case, the Master found, and the evidence in the record supports his finding that \$20,000 a year is a substantial minimum rental. This is not a case where the lessee has removed from the demised premises its business operation which determines the percentage rental. It is apparent that the considerations which were compelling in the Fox case are not present here.

The second case upon which plaintiffs rely in great measure is the case of Lippman v. Sears, Roebuck & Company, 44 Cal. 2d 135, 280 P.2d 775. This was a suit by the lessor to recover additional rent under a lease providing for payment of a base rental, plus a percentage of sales by lessee on the demised premises. The lessee had previously leased the



premises for \$285.00 per month. Thereafter, the premises burned and the tenant induced the lessor to purchase, rebuild and expand the building. The tenant orally promised a "substantial lease" on the enlarged premises, but stated that \$285.00 would have to remain as a figure for the base rent in order to pass the home office. The tenant also agreed to pay a percentage rent. The tenant operated a store in the premises until the last year of a ten-year lease when it used the premises solely for the storage of merchandise, selling at retail in a new location. The percentage rental paid during the next to last year was about \$17,000. The lease provided that if the tenant assigned or sublet the premises, the rent would be paid at the average rental of the preceding twelve months. The trial court held, and the Supreme Court of California affirmed its holding, that the minimum rental provision in that lease was not a substantial or adequate payment in lieu of payment of a percentage of the proceeds for the business contemplated by the lease, and that discontinuing sales was by implication the same as assigning or subletting and that the damages sustained should correspond to those resulting from assigning or subletting.

Again, the facts in the Lippman case are readily distinguishable from the case at bar, and its rationale, as in the Fox case, is not applicable here. In the Lippman case the court found that the minimum rental was not a substantial or adequate minimum rental, while the court in the present case found that the minimum rental was substantial. In the Lippman case, as in the Fox case, there was a complete discontinuance of sales at retail and a removal of the tenant's business operations to a new location. The Lippman case did not involve the question found here as to the extent, if any, to which a tenant might devote store premises to storage or warehouse purposes, where the elaborately drawn lease agreement contained no express provision on the subject and no restrictions



on use but did permit the use of outside warehouse space.

Plaintiffs rely on other cases similar to the Fox case, where the lessee set up another retail location in competition with the leased premises and took business away from it. There the landlord had no protection unless he could recover damages equivalent to the loss of business. In Seggebruch v. Stosor, 309 Ill. App. 385, 33 N.E. 2d, 159, the lessee of a filling station under a lease providing no minimum rent but only  $1\frac{1}{4}$  cents per gallon sold, opened a new filling station on adjoining property and diverted business to the new location. The court found a purpose to defraud and an implied covenant and subjected the sales at the adjoining location to the gallonage rent provision. In Selber Bros. v. Newstadt's Shoe Stores, 194 La. 654, 194 So. 579, the lessee opened a new store four months before the end of the lease. The lessee first transferred all its high quality merchandise and most profitable business to the new store and later before the end of the term abandoned the demised premises. The court properly held the plaintiff entitled to damages.

In Cissna Loan Co. v. Baron, 149 Wash. 386, 270 P. 1022, there was an express covenant by the lessee to "maintain and conduct a department store in said building of the same general character as has been heretofore conducted therein by [landlord] and carry and maintain a stock of goods, wares, and merchandise of the same general character as has been theretofore maintained by [landlord] ". When the lessee moved two departments of its business to an adjoining building, the court held that the express covenant was applicable, and that the lessee must pay percentage rent on sales in the transferred departments.

In Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214, a leading case, defendant argued that her exclusive contract for plaintiff's



personal services was void for want of mutuality, since plaintiff had made no express promise to exploit her fashion designs and endorsements. In order to prevent the contract from failing, the court implied such a covenant. This is the classic case in which a covenant will be implied. It illustrates the fundamental difference between the situation for which the doctrine was originally intended and the present case, where plaintiffs seek to add something new to the terms of a detailed contract.

The cases of Daughetee v. Ohio Oil Co., 263 Ill. 518, 105 N.E. 308, and Elliott v. Pure Oil Co., 10 Ill. 2d 146, 139 N. 2d, 295, involved oil leases where the court implied a covenant to develop the property to a reasonable extent. Oil leases are unique for two reasons: First, oil and gas are migratory, and unless they are extracted from a given piece of land there is danger that they will be drawn off through wells on adjoining lands. A covenant to develop the land is therefore necessary not only to save the contract but to save the oil and gas themselves. Secondly, it is frequently impractical to specify in advance exactly how much development should take place, since this will depend on the results obtained from exploratory wells. If these prove unprofitable, a covenant to continue the development of the land is never implied. These distinctions between oil and gas leases and all others are analyzed in an annotation entitled: "Extent of development necessary to comply with express or implied covenant of oil and gas lease as to development," in 93 A.L.R. Likewise, we do not regard the case of Stoddard v. Illinois Improvement and Ballast Co., 175 Ill. 199 as being in point. There the lessor who owned 480 acres





of land leased 10 acres to the lessee for ten years for the purpose of quarrying stone. Lessee was to pay 6 cents per yard for stone quarried. Although the lease did not explicitly require the lessee to quarry stone or to quarry stone diligently, the court held that failure to develop the premises for quarrying purposes was contrary to the intent and meaning of the lease, and that the lessor might recover damages therefor. Unlike the defendant in the Stoddard case, the defendant Ward has not abandoned or vacated the premises or failed to make profitable use of the same so far as it appears in the record.

As the court stated in Selber Bros. v. Newstadt's Shoe Store, 194 La. 654, 194 So. 579, whether the lessor under a percentage lease guaranteeing a minimum rental has cause to complain when the business is conducted in such a way that it will not produce additional rent consisting of percentage of gross sales is a matter dependent largely on the intention of the parties to the contract as expressed in the contract construed in the light of the circumstances under which it was made. In this case, prior to the lease in controversy the premises had been used by Ward and Sears, Roebuck for their respective Joliet retail stores. Use of the entire premises by Ward under the lease in question was a new venture, and its use of the premises and its profits cannot be compared with the leasing arrangements prevailing prior to Ward's occupancy of the entire premises. The plaintiffs insist that the minimum annual rental of \$20,000 shows on its face that the parties must have contemplated use of all of the premises for retail sales, arguing as they do that a \$20,000 minimum yearly rental is grossly inadequate in view of the value of the premises. In our opinion, the minimum annual rental was not grossly inadequate and the Master so found. We fail to follow plaintiffs' argument that the size of the minimum annual rental leads to the conclusion that the parties contemplated use of all of the premises for retail sales.



This court can take judicial notice that any retail store must have available to it in connection therewith a certain portion of warehouse or storage space. What amount or percentage of warehouse space is proper and reasonable this court cannot say, and the only evidence in the record on this point is the uncontradicted evidence of defendant's Joliet store manager. He testified in effect that the defendant, by allocating 25% of the premises to storage and 75% to actual retail sales, was using the premises under the lease in a reasonable manner and to the best advantage for merchandising at retail.

We do not find in the defendant's use of the premises as it did any undue advantage to defendant and any prejudice to the plaintiffs. Plaintiffs must have recognized at the time that Sears moved out of the North Building and Ward moved in that ordinarily two retail stores would yield more sales revenue and therefore more percentage rentals than one retail store in the same location. This is not a case where the tenant devoted the entire premises or even the entire North Building to storage or warehouse purposes. In the absence of some proof by the plaintiffs that use of 25% of a retail merchandising establishment for storage was unreasonable or improper or contrary to the custom of the trade, we cannot see that the lessee's allocation of the premises between storage and retail space worked an injury upon the lessors which would necessitate the finding of an implied covenant in this lease. It would seem also that there is some area within which the tenant, under a percentage lease may properly exercise his business judgment in the matters of occupancy and use of the premises. Our attention has been called to the practical difficulties which the court would encounter if the court were to find an implied covenant in this lease as urged by the plaintiffs. The problems which the court would face if it attempted to supervise the tenant's conduct of its business in a case of this

This court can take judicial notice that any retail store must have available to it in connection therewith a certain portion of warehouse or storage space. What amount or percentage of warehouse space is proper and reasonable is not a matter of law, but only evidence in the record on this point is the uncontroverted evidence of defendant's Joliet store manager. He testified in effect that the defendant, by allocating 25% of the premises to storage and 75% to actual retail sales, was using the premises under the lease in a reasonable manner and to the best advantage for the use of the premises as a retail store. He also testified in the defendant's case that the premises as a whole and any undue advantage to defendant and any prejudice to the plaintiff. Plaintiff's must have recognized at the time that it was one of the retail building and store moved to that originally was retail store would yield more sales revenue and therefore more percentage rental than one retail store in the same location. It is not a case where the tenant wanted the entire premises or even the entire retail building to be a retail store as a whole. In the absence of some proof the plaintiff has of 25% of a retail merchandising establishment for storage was unreasonable or improper or contrary to the custom of the trade, we cannot see how the lease's allocation of the premises between storage and retail space would be an injury upon the lessor which would necessitate the finding of an implied covenant in this lease. It would seem also that there is some area within which the tenant, under a percentage lease may properly exercise his business judgment in the matters of occupancy and use of the premises. Our attention has been called to the practical difficulties which the court would encounter if the court were to find an implied covenant in this lease as urged by the plaintiff. The problems which the court would face if it attempted to supervise the tenant's conduct of the business in a case of this

kind were well stated in the case of Dickey v. Philadelphia Minute Man Corp., 377 Pa. 549, 105 Atl. 2d 580, where the court stated, page 582:

"If an implied covenant, as claimed by plaintiff, should be held to arise in such cases what would be the extent of the restriction thereby imposed upon the lessee? Would it extend to each and every act on his part that might serve to reduce the extent of his business and thereby the percentage rental based thereon? Would it forbid him, for example, if operating a retail store, from keeping it open a fewer number of hours each day than formerly? Would it forbid him from dismissing salesmen whereby his business might be reduced in volume? Would it forbid him from discontinuing any department of his business even though he found it to be operating at a loss? It would obviously be quite unreasonable and wholly undesirable to imply an obligation that would necessarily be vague, uncertain and generally impracticable."

Not only is the lease in question clear that the defendant is not obligated to use all of the premises for retail sales (which the plaintiffs concede), but it is abundantly clear that the so-called "past performance" provision of the lease was not intended to apply in such event nor in the manner that plaintiffs urge. Plaintiffs have at all times considered that the twenty-four month rental period for measuring so-called "past performance" is the twenty four months immediately preceding Ward's occupancy of the entire premises. This construction does not accord with Section 22(d) of the lease, which employs the language "the average monthly percentage rental paid during the twenty four (24) months or lesser period of occupancy preceding such event (i.e. vacation of entire premises, entire cessation of selling at retail, assigning or subletting in toto).". If the plaintiffs desired restrictions as to the allocation of space between warehouse and retail space, they should have included an appropriate provision in the lease. In a skillfully drawn agreement, such as we have here, it seems all too plain that

kind were well stated in the case of Shirley L. Philadelphia Estate  
Man Corp., 377 Pa. 349, 105 A.2d 880, where the court stated, page

582:

"If an implied covenant, as claimed by Plaintiff, should be held to arise in such cases what would be the extent of the restriction thereby imposed upon the tenant? Would it extend to each and every act on his part that might serve to reduce the extent of his business and thereby the percentage payable based thereon? Would it forbid him, for example, if operating a retail store, from keeping it open a fewer number of hours each day than formerly? Would it forbid him from displaying sale items whereby his business might be reduced in volume? Would it forbid him from discontinuing any department of his business even though he found it to be operating at a loss? It would obviously be quite unreasonable and wholly impractical to imply an obligation that would necessarily be vague, uncertain and generally ineffectual."

Not only is the issue in question clear that the defendant is not obligated to use all of the premises for retail sales (which is what this court concludes), but it is doubtful, when the so-called "proportionate" provision of the lease was not intended to apply in any event not in the manner that Plaintiff urges. Plaintiff has at all times considered that the twenty-four month rental period for measuring so-called "past performance" is the twenty-four month immediately preceding Ward's occupancy of the entire premises. This consideration does not accord with Section 22(4) of the lease, which employs the language "the average monthly percentage rental paid during the twenty-four (24) months or lesser period of occupancy preceding and over (i.e., vacation of entire premises, entire cessation of selling at retail, assigning or expelling in part)." If the Plaintiff's desired restrictions as to the allocation of space between warehouse and retail space, they should have included an appropriate provision in the lease. In a skillfully drawn agreement, such as we have here, it seems a fool thing that

if such had been the intention of the parties, it could and would have been expressed by plain covenants to that effect. The Lippman case relied upon by plaintiffs states the rules governing implied covenants. The California Supreme Court summarized the applicable principles as follows, p.779:

"The rules which govern implied covenants have been summarized as follows: "(1) The implication must arise from the language used or it must be indispensable to effectuate the intention of the parties; (2) it must appear from the language used that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it; (3) implied covenants can only be justified on the grounds of legal necessity; (4) a promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it; (5) there can be no implied covenant where the subject is completely covered by the contract".

Applying the foregoing principles to the facts in the instant case, no implied covenant can properly be found here.

Since the record in this case is devoid of any factual basis for believing that the parties, either by mistake or through fraud, omitted a provision as contended for by plaintiffs, this court is not at liberty to insert such a provision under equitable principles of reformation.

We therefore hold that the decree of the Circuit Court of Will County was in all respects correct and it is hereby affirmed.

Decree affirmed.

*Wright P.J.  
Concurs.*  
WRIGHT, J. Concurs

if such had been the intention of the parties, it could and would have been expressed by plain covenants to that effect. The typical case is upon by plaintiffs across the line governing the same. The California Supreme Court announced the applicable principles as follows:

1. (1):

"The rules which govern implied covenants have been summarized as follows: (1) The implication must arise from the language used on its face or be inferable from the facts of the case; (2) it must appear from the language used that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it; (3) implied covenants can only be justified on the grounds of legal necessity; (4) a promise can be implied only where it can be rightfully demanded that it would have been made if attention had been called to it; (5) there can be no implied covenant where the subject is completely covered by the contract."

Applying the foregoing principles to the facts in the instant case, no implied covenants can properly be found here. Since the record in this case is devoid of any factual basis for believing that the parties, either by mistake or through fraud, omitted a provision as contended for by plaintiffs, this court is not at liberty to insert such a provision under equitable principles of restoration. We therefore hold that the decree of the Circuit Court of Will County was in all respects correct and it is hereby affirmed.

Decree affirmed.

*Wright*  
*Concurs*

WRIGHT, J. Concurs



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47399

JEAN GINOCCHIO,

Appellee,

v.

FRANK FREDERICK and JOSEPH FREDERICK,

Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

19 I.A.<sup>2d</sup> 3031

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is an action on two bearer promissory notes, each for the sum of \$2,000, one note bearing the signature of defendant Frank Frederick and the other the signature of defendant Joseph Frederick. The notes were in the possession of plaintiff's deceased husband, John Ginocchio, at the time of his death. There is no dispute as to the delivery of the notes or genuineness of signatures. The case was heard without a jury, and the court entered judgment against each defendant in the amount of \$2,881.80. Defendants appeal, and no questions are raised on the pleadings. Plaintiff has filed no brief. The only issue on appeal is the question of plaintiff's title to the notes sued on.

Roy Ginocchio testified that he was the son of plaintiff and John Ginocchio, deceased; that he was the administrator of his father's estate; that the notes were distributed to his mother as part of her inheritance; and that he signed the inventory and the notes involved in this case were part of the Maggio \$11,000 indebtedness listed in the inventory.

2000

1000

1000

1000

the above

the above

the above

There was read into the record an order of the Probate Court ordering that distribution in kind be made of the assets of John Ginocchio, deceased, in payment of unpaid claims and widow's award against said estate, and that there was delivered to Jean Ginocchio, among other items, notes receivable at face value of \$15,700.

Alex Maggio, called by plaintiff as an adverse witness under section 60 of the Civil Practice Act, testified that he was present when the notes in question were signed by Frank and Joseph; that money was needed for the McAvoy Brewing Company, a brewery in which Maggio and the Frederick brothers were interested; that he told the brothers he could raise the money for them on their notes; that they signed the notes in question, which he in turn delivered to John Ginocchio; that John Ginocchio gave him the money for the notes, and with \$2,000 of the money he purchased beer stamps for use by the brewery, and deposited the balance in the McAvoy Brewing Company account in the South Holland Trust and Savings Bank.

Both Frank and Joseph Frederick testified for the defense, admitted the execution of the notes, but denied receiving any money from John Ginocchio or any other person, including Maggio, on account of the notes.

The defendants introduced in evidence the inventory filed in the estate of John Ginocchio, deceased, and listed under the heading of "Notes--Good" is an item "Alex Maggio. . \$11,000.00."

It is defendants' theory that as the inventory filed in said estate does not specifically list the notes in question,



plaintiff has no title or right to sue on them. Defendants' first point is that upon the death of a party and the appointment of an administrator, the legal title to all notes due the intestate vests in the administrator, who alone can sue and recover upon the same, and that the heir at law can maintain no action on such notes. This contention is true as long as the notes are held by the administrator as part of the estate of the decedent, but when the administrator properly distributes the notes in kind to an heir at law, that heir at law can maintain an action thereon in his or her own name.

Defendants' second point is that an heir of a person dying intestate cannot maintain a suit upon a promissory note in her own name, unless said note had passed through due administration under the direction of the proper court. We have examined the authorities cited by defendants in support of this contention and believe they do not apply to this case.

The facts, as revealed by the evidence in the instant case, are sufficient to permit plaintiff to sue on the notes in her own name. There is testimony in the record to show that she is the widow and an heir at law of the decedent, and that there was an item in the inventory which the administrator claims included the notes in question, although the details were not set forth. The record further discloses that the administrator, pursuant to an order of the Probate Court, delivered these notes in kind to plaintiff, in payment of her claims and widow's award, from which the trial court properly found that the legal title to



these notes was transferred from the administrator to the plaintiff, even though an examination of the inventory does not reveal the details or maker of the notes. The object of an inventory is to list the amount and value of items of property constituting the estate of the decedent, and the failure to list, or the improper listing in an inventory, of an item owned by an estate, is not determinative of the title thereto. 19 I.L.P. 61; 33 C.J.S. 1085, 1094.

In fact, in a proper case, no administration is necessary to transfer title to decedent's assets. Paragraph 95 of the Probate Act (Ill. Rev. Stat., 1957, ch. 3, par. 247) provides that when the persons in interest desire to settle an estate without administration, they may do so where (1) all claims are paid, and (2) all heirs, legatees and devisees of the decedent are residents of this state and are of legal age. This section was not mentioned in Weiland v. Weiland, 297 Ill. App. 239 (1938), but that case decided that heirs of a deceased intestate could maintain suit in their own names upon promissory notes payable to intestate, where all his debts had been paid and the estate had not been probated.

We believe the law was correctly applied to the evidence in the record, and therefore the judgments against the defendants, Frank Frederick and Joseph Frederick, are affirmed.

AFFIRMED.

LEWE, P.J. and KILEY, J., CONCUR.

ABSTRACT ONLY.





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General No. 11187

A  
Agenda No. 5

FILED

IN THE

APPELLATE COURT OF ILLINOIS

NOV 1 - 1958

SECOND DISTRICT - FIRST DIVISION

PAUL V. WUNDER  
Clerk Appellate Court Second District

October Term A.D. 1958

191A<sup>23</sup> 303

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MARIA SOLA,

Plaintiff-Appellant,

vs.

JOSEPH SOLA,

Defendant-Appellee.

)  
) Appeal from the  
)  
)

) Circuit Court of  
)

) Winnebago County  
)  
)

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DOVE, J.

The parties to this proceeding were married on January 24, 1957 and lived together in Rockford as husband and wife until the plaintiff, Maria Sola, left their home on August 15, 1957, and since that time the parties have been living separate and apart. On August 23, 1957 the plaintiff, filed her complaint in the circuit court of Winnebago County which after alleging the marriage and separation as stated, charged, that since said marriage, the defendant had (1) on numerous occasions ordered the plaintiff to leave their home; (2) failed and refused to supply adequate food for the plaintiff; (3) refused to supply care, medicine or medical attention for the plaintiff and (4) refused to supply the plaintiff with clothing or money with which to buy clothing. The plaintiff averred that on account of this treatment she left their home and was obliged to live separate and apart from the defendant.

FILED

APPELLATE COURT OF ILLINOIS

SECOND DIVISION - WEST PLY, ILL.

October Term A.D. 1932

AUGUST 15, 1932  
APPELLATE COURT SECOND DIVISION

	{	MARIA GOLA,
	{	Plaintiff-Appellant,
Appeal from the	{	
Circuit Court of	{	
Winnebago County	{	JOSIE GOLA,
	{	Defendant-Appellee.

INVEST. 3.

The parties to this proceeding were married on January 23, 1927 and lived together in Rockford as husband and wife until the plaintiff, Maria Gola, left their home on August 15, 1932, and since that time the parties have been living separate and apart. On August 23, 1932 the plaintiff filed her complaint in the Circuit Court of Winnebago County, which after alleging the marriage and separation as stated, charged, that since said marriage, the defendant had (1) on numerous occasions ordered the plaintiff to leave their home; (2) failed and refused to supply adequate food for the plaintiff; (3) refused to supply care, medicine or medical attention for the plaintiff; and (4) refused to supply the plaintiff with clothing or money with which to buy clothing. The plaintiff averred that on account of this treatment she left their home and was obliged to live separate and apart from the defendant.

The complaint further alleged that the defendant was an able bodied man, the owner of considerable property and was regularly employed until July 29, 1957, earning approximately \$50.00 per week. The prayer of the complaint was that plaintiff be granted separate maintenance and attorney fees.

The answer of the defendant admitted the marriage but denied the other charges contained in the complaint and as an affirmative defense defendant averred that plaintiff left their homestead without justifiable reason or cause and wilfully refuses to return; that at all times since she left defendant had been and is ready and willing for the plaintiff to return to the home of the defendant and that if she did he would continue to provide her with adequate food, medical attention, clothes, and money. A reply to this affirmative defense averred that the defendant was not sincere in his offer to provide plaintiff with a home and averred that she had repeatedly requested him to treat her with conjugal love and affection and to provide her with the necessities of life but that on many occasions he had refused so to do. The issues thus made by the pleadings were heard by the chancellor resulting in a decree dismissing the complaint for want of equity. To reverse that decree plaintiff prosecutes this appeal.

The record discloses that both of the parties are approximately sixty-five years of age. They are of Italian extraction and speak English with difficulty and during the hearing, an interpreter was necessary. No children have been born to this marriage but each party had been previously married and each have adult children by their former marriages.

testified  
The plaintiff/that she always conducted herself as a

The complaint further alleged that the defendant was an able bodied man, the owner of a valuable property and was regularly employed until July 29, 1907, earning approximately \$50.00 per week. The master of the complaint was that defendant be granted separate maintenance and attorney fees.

The answer of the defendant admitted the facts set forth in the complaint and denied the other facts contained in the complaint and as an affirmative defense defendant averred that the plaintiff is a homebound without practical reason or cause and is unable to return to return; that at all times since the defendant had been and is ready and willing to return to the plaintiff to the home of the defendant and to do so as a matter of course to provide her with adequate food, clothing, shelter, and money. A reply to this affirmative defense stated that the defendant was not sincere in this offer to provide plaintiff with a home and averred that she had attempted to separate from her with conjugal love and affection and to provide her with the necessities of life but that on many occasions she had refused to do so. The answer was made by the plaintiff and was signed by the attorney representing in a decree of divorce and restraining for want of equity. It avers that the defendant is a woman of this appeal.

The record discloses that both of the parties are approximately thirty-five years of age. They are of Italian extraction and speak English with difficulty and during the hearing, an interpreter was necessary. No children have been born to this marriage but each party had been previously married and each have adult children by their former marriages.

The plaintiff testified that she always conducted herself as a

kind, true, dutiful, chaste and affectionate wife. Her evidence was that for two months after this marriage defendant gave her \$30.00 a week but that she never expended more than \$10.00 per week for food; that after the first two months he gave her \$10.00 per week but this amount was gradually decreased to \$7.00, then \$5.00, and finally \$2.00 per week. She further testified that besides giving her this amount of money defendant brought home food for the table but the meat always consisted of veal; that during the last four months while they lived together they "had bread and cheese to eat at noon and in the evening soup and spaghetti and sometimes he would bring home a chicken and when he did "I had to cut it in four parts and cook a quarter at a time". She further testified that she never asked her husband for more food and stated that they had a food locker in the basement to which she had access. She stated that at the time of their marriage she lived in Chicago and owned a two-family flat there which was occupied by her daughters by a former marriage; that she had an income therefrom of \$40.00 to \$60.00 per month and also had social security amounting to \$65.00 per month and had \$10,000.00 in a Chicago bank. Her evidence is that after she came to Rockford she became nervous, had high blood pressure and that when she told her husband of this condition he advised her to see her doctor in Chicago which she did. She further testified that upon one occasion she became ill cooking supper and went to her room and asked her husband to bring her a cup of coffee but ~~that~~ he stated there was no coffee left over from morning and declined to make any for her. Upon another occasion she said she asked her husband for clothes and he told her to clothe herself with her own money. She further stated that frequently

kind, true, dutiful, cheerful and affectionate wife. Her evidence was that for two months after this marriage defendant gave her \$30.00 a week but that she never expended more than \$10.00 per week for food; that after the first two months he gave her \$10.00 per week but this amount was gradually decreased to \$7.00, then \$5.00, and finally \$2.00 per week. She further testified that besides giving her this amount of money defendant brought home food for the table but she was always in want of food; that during the last four months while he lived together they had bread and cheese to eat at noon and in the evening soup and spaghetti and sometimes he would bring home a chicken and when he did" had to eat it in 10 minutes and cook a portion of it. She further testified that she never asked her husband for more food and stated that they lived in a room in the basement to which she had access. She stated that at the time of this marriage she lived in Chicago and owned a two-family flat there which was occupied by her daughters by a former marriage, that she had an income in interest of \$10.00 to \$20.00 per month and also had social security amounting to \$25.00 per month and had \$10,000.00 in a Chicago bank. Her evidence is that after she came to Houston she became nervous, her high blood pressure and that when she told her husband of this condition he advised her to see her doctor in Chicago which she did. She further testified that upon one occasion she became ill cooking supper and went to her room and asked her husband to bring her a cup of coffee but ~~that~~ he stated there was no coffee left over from morning and declined to make any for her. Upon another occasion she said she asked her husband for clothes and he told her to clothe herself with her own money. She further stated that frequently

she tried to talk to him about changing his method of living to which he replied that if she liked the way they were living she could stay, otherwise she was free to leave and that she did leave on August 15, 1957.

Besides the plaintiff and defendant the only other witness who testified was Colorinda Dal Pra. She was called by the plaintiff and her testimony was that on April 16, 1957 the plaintiff called her to come to the home where the plaintiff and defendant were living; that she did so and when she arrived she observed that the plaintiff was kneeling in the center of the living room and upon that occasion the plaintiff asked her husband to pardon or forgive her because "she had used a wrong word". As we understand the record the defendant was wearing a black tie and plaintiff had asked him to wear some other colored tie. Mrs. Dal Pra further testified that upon this occasion the defendant said his wife was a nervous woman and he couldn't get along with her because she was nervous and that she had enough money to live on "in her own right".

As abstracted the defendant testified: "I am 65 years old. I never told my wife to leave the house. I told her if she wanted to come back I would take her back and live as husband and wife; I would buy everything and put \$10.00 on the dresser and when there wasn't any I would put \$5.00 more and that's all. I gave her money to buy medicine. She never went to the doctor except once and that was in Chicago. She never asked me for money to go to a doctor in Rockford." On cross examination defendant testified that he did not recall whether he gave his wife \$30.00 per week for food after they were first married but denied that he ever gave her less than \$5.00 a week. He stated that he bought all of the groceries and that he bought steaks two or three times a week and until she told him that she



she tried to talk to him about changing his method of living to which he replied that if she liked she may stay living she could stay, otherwise she would have to leave and that she did leave on August 15, 1927.

Besides the fact that she was a witness who testified was defendant's wife, she was called by the plaintiff as a witness and that on August 15, 1927 the plaintiff called her to court in a case where she testified and defendant were living; that a day or two after the witness she observed that the plaintiff was working in the yard of the living room and again on occasion she testified as to her husband's reason for leaving "I suppose" and that she was a "word". As we understood the plaintiff was a woman of a certain age and a black tie and plaintiff was called by the witness colored man, that the witness testified that about 1927 occasion the defendant said she was a housewife and no could get along with her because she was nervous and that she had enough money to live in "finer own house".

As abstracted the defendant testified: "I am 47 years old. I never told my wife to leave the house. I did not and she wanted to come back I would have her back and live as husband and wife; I would pay everything and give her \$10.00 on the dollar and when there wasn't any I would pay \$2.00 more and that's all. I gave her money for dry cleaning. She never went to the doctor except once and that was in Chicago. She never asked me for money to go to a doctor in London." On cross examination defendant testified that he did not recall whether he gave his wife \$30.00 per week for food after they were first married but denied that he ever gave her less than \$2.00 a week. He stated that he bought all of the groceries and that he bought steak two or three times a week and until she told him that she



was tired of eating steaks. His testimony was that they always had plenty of food and that he said to her: "Here there's food to eat and drink and you don't have to leave." He denied that he ever told his wife that if she didn't like the way they were living that she could leave.

The theory of the plaintiff is that the evidence discloses that the defendant failed to support his wife and refused to buy her adequate food or pay for her medical attention; that by his conduct, he made life so unbearable that she was required to leave. In support of plaintiff's contention counsel cite and rely upon Johnson v. Johnson, 125 Ill. 510; Holmstedt v. Holmstedt 383 Ill. 290; French v. French 302 Ill. 152 and Smith v. Smith 226 Ill. App. 157.

The facts in these cases are not analogous to the facts found in this record. These cited cases hold that where a wife is not at fault, she is not bound to live and cohabit with her husband if his conduct is such as to directly endanger her life, person or health or if he pursues a persistent, unjustifiable and wrongful course of conduct toward her which will necessarily and inevitably render her life miserable and unendurable.

There is no evidence in this record to sustain the charge that defendant failed to support his wife or refused to supply adequate food or clothing for the plaintiff. With reference to her charge that he refused to furnish her medicine or medical attention her testimony was that after she came to Rockford she had high blood pressure and became nervous and upon one occasion told her husband about this and he told her to go to her doctor in Chicago where she had previously lived and she did so. She also testified that while cooking supper she became ill and went to her room and asked her husband to bring her a cup of coffee but he did not do so.

was tired of seeing people. His testimony was that they always had plenty of food and that he said to her: "Don't worry about to eat and drink and you don't have to leave." He testified that he even told his wife that if she didn't like the way they were living that she could leave.

The theory of the plaintiff is that the evidence disclosed that the defendant failed to support his wife and refused to pay her adequate food for her and medical attention; that by his conduct, he made life so unbearable to her that she was required to leave. In support of plaintiff's contention counsel also rely upon Johnson v. Johnson, 111 Ill. 519; Holmsted v. Holmsted 103 Ill. 299; French v. French 102 Ill. 128 and Smith v. Smith 226 Ill. App. 127.

The facts in these cases are not analogous to the facts found in this record. These cases arose from a wife's not at fault, but a husband's failure to support her life, as to conduct as well as to directly maintain her life, person or health or to provide a reasonable, comfortable and respectful manner of conduct toward her which will necessarily and inevitably render her life miserable and unbearable.

There is no evidence in this record to sustain the charge that defendant failed to support his wife or refused to supply adequate food or clothing for the plaintiff. With reference to her charge that he refused to furnish her medicine or medical attention her testimony was that after she came to Rockford she had high blood pressure and became nervous and upon one occasion told her husband about this and he told her to go to her doctor in Chicago where she had previously lived and she did so. She also testified that while cooking supper she became ill and went to her room and asked her husband to bring her a cup of coffee but he did not do so.

The occurrence about which Mrs. Dal Pra testified took place less than three months after the parties were married. Just what the plaintiff said to her husband does not appear from the record. Evidently she did not like the black tie he was wearing and so expressed herself and then realized that she had spoken hastily or unthoughtedly and at the time Mrs. Dal Pra entered the room she was kneeling before her husband and asking him to pardon or forgive her inconsiderate words. This witness testified that defendant stated to her and to his wife that Mrs. Sola had enough to live on in her own right and that she could leave if she wanted to, but she did not leave and the parties continued to live together for four months thereafter. It is clear that nothing took place on April 16, 1957 which induced the plaintiff to leave on August 15th following. The complaint does not charge nor does the evidence disclose any physical mistreatment of the plaintiff by the defendant. It does disclose that plaintiff was nervous and was not satisfied with her husband's mode of life but the authorities relied upon by appellant all hold that trivial difficulties, or conduct on the part of the husband such as disclosed by this record cannot justify the parties to a marriage contract, living separate and apart.

The chancellor saw the parties and heard them testify. He was warranted in concluding that the evidence did not disclose a course of conduct on the part of the defendant toward the plaintiff which was calculated to render her life miserable and unendurable and which would justify her in leaving her home. The decree dismissing the complaint must be affirmed.

Decree affirmed.

SPIVEY, P.J. concurs.

McNEAL, J. Concurs.



47513

HENRY J. BRUBAKER and  
CIVILLA BRUBAKER,

Plaintiffs-Appellees,

v.

W. E. GOULD, W. E. GOULD  
AND COMPANY, an Illinois  
Corporation, INTERLAKE  
INDUSTRIES CORPORATION, an  
Illinois Corporation, and  
J. H. LAHMAN,

Defendants,

W. E. GOULD and W. E. GOULD  
AND COMPANY, an Illinois  
Corporation, and INTERLAKE  
INDUSTRIES CORPORATION, an  
Illinois Corporation,

Certain Defendants-  
Appellants.

INTERLOCUTORY

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

19 I.A.<sup>2d</sup> 412

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal, by defendants except Lahman, from an order appointing a receiver pendente lite for Interlake Industries Corporation, hereinafter referred to as Interlake.

Interlake is engaged in warehousing and leasing space in its buildings at Rockdale, Illinois. The buildings were purchased from the War Assets Administration by Lahman and Henry Brubaker in February, 1949. In May of 1949 Brubaker assigned his interest to Lahman. Among the items listed in the property assignment as consideration to Brubaker was a promise that Lahman would reserve Brubaker "his heirs" etc. a one tenth interest in the common stock of Interlake. The certificate for the one tenth interest or 1000 shares



issued in the name of plaintiff, Civilla Brubaker. On or about May 8, 1951 she endorsed and delivered the certificate to Lahman in exchange for his check for \$5,000 payable to both plaintiffs.

The sale of the Brubaker stock to Lahman was made to enable him to comply with his agreement to deliver all of the Interlake stock to defendant, W. E. Gould and Company. This agreement was made May 29, 1950, when Lahman was president of, and owner of, 75 per cent of the stock of Interlake. February 6, 1951, Gould's attorney wrote Lahman that the Brubaker certificate had not been delivered and gave one week in which to cause its delivery to W. E. Gould, president of defendant company.

The Brubaker complaint alleged fraud in the transaction by which Brubaker assigned his interest to Lahman and by which Lahman transferred Interlake to Gould and Company and fraud in inducing the Brubakers to sell their stock to Lahman. They prayed for a cancellation of the sale of this stock and of the May 25, 1949, assignment by Brubaker to Lahman; an accounting of Interlake operations from February 1949 and of all transactions between Interlake, Lahman, Gould and the Gould company; a judgment against Gould, the Gould company and Lahman for \$2,000,000; and the appointment of a receiver.

On December 23, 1955, after answers and reply were filed, the cause was referred to a master in chancery. This cause and a motion for a finding made by defendants at the close of the plaintiffs' testimony are still before the master. On May 13, 1958, plaintiffs filed the petition for





the appointment of a receiver of Interlake.

The chancellor relying on the pleadings and colloquy of counsel entered the order granting the appointment of the receiver. The question is whether he abused his discretion in doing so.

Defendants contend that there was an abuse of discretion since plaintiffs did not have ~~standing~~ to sue; that it was error to appoint a receiver without the taking of evidence where the material allegations in the petition were denied; and that ~~no~~ grounds have been established for the appointment of a receiver.

In Fox v. Fox Valley Trotting Club, Inc., 349 Ill. App. 132, 137, this court in reversing an interlocutory order requiring the Trotting Club to deposit security in lieu of an appointment of a receiver stated, "a sound judicial discretion in appointing receivers is based upon the fact that there is no other adequate remedy or means of accomplishing the desired result, and there should be a reasonable probability that plaintiff will ultimately prevail in the suit."

Plaintiffs here are not stockholders and generally this fact would defeat their showing of standing to sue. Central Standard Ins. Co. v. Davis, 10 Ill.2d 566, 576. In order for plaintiffs to show standing they must prove that the transfer of their stock to Lahman was procured by fraud. The charges of fraud are denied in the sworn answer. We said in the Fox case, page 138, "the appointment of the receiver without taking evidence in support of the sworn answer was



clearly erroneous. Klass v. Yavitch, 302 Ill. App. 229." Since the testimony before the master was not before the chancellor, there was no evidence to support the charges of fraud.

Even assuming, but not deciding, plaintiffs have standing, the only ground upon which plaintiffs can base their right to a receiver is the ground of fraud as alleged in their petition. The petition, not accompanied by a transcript of the testimony made before the master, summarized the testimony of Lahman and Gould who were called as adverse witnesses before the master. According to the "summary" Lahman admitted he was dominated by Gould and admits that under this domination he performed "illegal acts"; that he illegally transferred assets of Interlake to Gould; that he illegally obligated Interlake to pay sums of money to Gould and the Gould company; that he diverted funds of Interlake in his transactions with Gould and that Gould was aware of these diversions; and that Gould induced him to withhold knowledge of the sundry "illegal transactions" from the directors and stockholders of Interlake. Furthermore, according to the "summary," Gould also admitted illegal acts. Defendants Gould, Gould and Company and Interlake in their answer allege the use of the term "illegal" to be a conclusion, and allege that the testimony before the master, on the contrary, shows that there was no fraud or illegal acts committed by Gould and the Gould company in their transactions with Lahman or Interlake. Without discussing the oral arguments of counsel at the time the chancellor heard the petition, it is safe to say that the basis and implications of all the transactions between



plaintiffs, Lahman and Gould were highly controverted. The attorney for Lahman admitted before the chancellor the "summary" of the testimony accorded to his client but the attorney for Gould and the Gould company denied that the transactions between Gould and Lahman were illegal or that Gould dominated Lahman.

In Simpson v. Adkins, 311 Ill. App. 543, 550-51, the court stated that a "clear case of fraud" must be presented before a receiver pendente lite should be appointed on that ground and went on to say that "the courts of this State have many times concluded that fraud can be alleged only by allegation of facts constituting the fraud and that the word 'fraudulently' does not allege anything and is a mere expletive, or a word of abuse." In this case the facts leading up to, and involved in, the various transactions between Gould and Lahman are controverted. The questions of fraud and illegality are in issue. We conclude that plaintiffs have not shown a "clear case of fraud."

The appointment cannot be justified in order to preserve the status quo, since its effect would be to change the status quo. No authority cited by plaintiffs in their brief or additional authorities afford any basis for sustaining the order of appointment.

Finally, the order appointing the receiver does not provide for a plaintiffs' bond and no facts are found in the order as a basis for waving the requirement. Ill. Rev. Stat., Chap. 22, Par. 54.

For the reasons given the order appointing the receiver for Interlake is reversed.

Order reversed.

Lewe, P. J., and Murphy, J., concur.

Abstract only.

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1000 MUSEUM AVENUE  
NEW YORK, N. Y. 10028

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47319

FRANCES CLEVELAND and LEONARD WAYMAN,

Appellees,

v.

THE CITY OF CHICAGO, a Municipal  
corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

19 I.A. 416<sup>2d</sup> 3

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

On September 10, 1951, a judgment was entered in favor of Frances Cleveland and Leonard Wayman, declaring the Chicago zoning ordinance, and amendments thereto, void, insofar as they prohibited the use of plaintiffs' property for any other classification than "'Apartments', second Volume," under the zoning ordinance of 1929. On May 24, 1957, in the original declaratory judgment suit, on a petition for supplemental relief of Wayman, the trial court entered a judgment order directing a writ of mandamus to issue, compelling the City of Chicago, and its respective officers, to grant Wayman "a building permit, driveway permits and such other approvals, documents or permits that might be necessary to enable" him to construct an apartment building as described in his plans and specifications. Defendant appeals.

The judgment was entered on the petition for supplemental relief and the answer of the City. The City's motion to strike and dismiss the petition was waived.





The original declaratory judgment order found that the amendment to the zoning ordinance subsequent to the year 1929, changing the classification of plaintiff's property, was void, and that if plaintiff sought application for permission to erect a structure of the kind permitted in 1929, and prior thereto, the City should receive such application and approve it with respect to zoning, if it otherwise complied with the ordinances of the City of Chicago.

The petition filed May 3, 1957, alleges the declaratory judgment of September 10, 1951; plaintiff's application for a building permit for an apartment building; that the plans and specifications provided for parking areas to comply with city ordinances; that driveways were necessary for access into and out of the property involved to the public street, across the curbing and sidewalks of the City of Chicago; and that driveways for such purpose were provided in the building plans. It further alleges that plaintiff's application for driveway permits was denied, and consequently he is unable to proceed to secure the building <sup>and</sup> permit; that this "denial" of the driveway and building permits for his building is a violation of the declaratory judgment, so as to entitle him to a writ of mandamus.

The answer raised the issue whether plaintiff was entitled to mandamus, since he admittedly did not pursue his administrative remedies and did not appeal the denial of his application for driveway permit to the mayor, in accordance with Section 33-17 of the Municipal Code. Plaintiff argues here, that, since the court reserved jurisdiction in the declaratory



judgment suit, plaintiff was not required to follow the administrative procedure, and that defendant "is purely hypertechnical and litigious," and that there appears to be no reason for defendant's opposition "other than the whim or caprice of certain officials of the City of Chicago."

We do not agree with plaintiff's contention that the Circuit Court, on the issues set forth in the supplemental petition for relief and the answer thereto of the City, was entitled, under the declaratory judgment proceeding, to enter the complained of judgment order for a writ of mandamus, without first requiring plaintiff to exhaust the administrative remedies provided by Section 33-17 of the Municipal Code. The factual situation comes within the scope of the rule announced in Bright v. City of Evanston, 10 Ill. 2d 178, and followed by this court in Sheridan Shores, Inc. v. Chicago, 13 Ill. App. 2d 377, wherein it was held that under circumstances such as are presented in the instant case, plaintiff is not entitled to seek judicial relief until he has exhausted the available administrative remedies provided by city ordinance.

The contention of plaintiff, that "the ordinance providing the so-called administrative remedy is unconstitutional and void," comes too late. Nowhere in the record does it appear that plaintiff questioned the constitutionality of the ordinance in the trial court. He filed no reply to defendant's answer, which affirmatively set forth the administrative remedies, which the defendant City claimed plaintiff had failed to exhaust before



more info  
page submitted  
to the probate court.  
in right of vivos

-4-

seeking relief in the instant case. This being so, the question is waived. Village of Riverside v. Kuhne, 397 Ill. 108. By joining issue in the Appellate Court, plaintiff also waived all constitutional questions. Tree v. DeMar, 2 Ill. 2d 547 (1954). In that case it was argued that a freehold was involved in the decree of the Superior Court of Cook County, and that the

Appellate Court had no jurisdiction of the appeal, as the Civil Practice Act, Chap. 110, §75 (1) (a), provides that appeals which involve a freehold shall be taken directly to the Supreme Court. On page 557 the court said:

"No question was raised on the appeal by Ronald Tree that the controversy involved a freehold and was not properly appealable to the Appellate Court, nor was there any motion on the part of Ronald Tree to transfer the cause to this court for the reason that a freehold was involved. \* \* \* On appeal to this court neither party can insist that the question be considered here. Since the assignments of error to the Appellate Court in this cause presented questions which that court might lawfully consider, by submitting the cause without objection to jurisdiction or motion to transfer, the parties waived or abandoned any assignments of error with respect to freehold." (Italics ours.)

Therefore, by joining issue in this court without objection to jurisdiction or moving to transfer the appeal to the Supreme Court, plaintiff has waived any assignment of error based on the validity of the municipal ordinance in question.



seeking relief in the instant case. This being so, the question is waived. Village of Riverside v. Kuhne, 397 Ill. 108. By joining issue in the Appellate Court, plaintiff also waived all constitutional questions. Tree v. DeMar, 2 Ill. 2d 547 (1954). In that case it was argued that a freehold was involved in the decree of the Superior Court of Cook County, and that the Appellate Court had no jurisdiction of the appeal, as the Civil Practice Act, Chap. 110, §75 (1) (a), provides that appeals which involve a freehold shall be taken directly to the Supreme Court. On page 557 the court said:

"No question was raised on the appeal by Ronald Tree that the controversy involved a freehold and was not properly appealable to the Appellate Court, nor was there any motion on the part of Ronald Tree to transfer the cause to this court for the reason that a freehold was involved. \* \* \* On appeal to this court neither party can insist that the question be considered here. Since the assignments of error to the Appellate Court in this cause presented questions which that court might lawfully consider, by submitting the cause without objection to jurisdiction or motion to transfer, the parties waived or abandoned any assignments of error with respect to freehold." (Italics ours.)

Section 75 (1) (c) also provides that appeals, in which the validity of a municipal ordinance or county zoning ordinance is involved, shall be taken directly to the Supreme Court. Therefore, by joining issue in this court without objection to jurisdiction or moving to transfer the appeal to the Supreme Court, plaintiff has waived any assignment of error based on the validity of the municipal ordinance in question.





-5-

In view of our determination that plaintiff was required to affirmatively allege and prove the exhaustion of available administrative remedies as a condition precedent to judicial relief, it is unnecessary to determine other contentions made by both sides.

The judgment of the Circuit Court must therefore be reversed and the cause remanded with directions to dismiss plaintiff's petition for supplemental relief.

REVERSED AND REMANDED  
WITH DIRECTIONS.

LEWE, P.J. and KILEY, J. CONCUR.

ABSTRACT ONLY.



411  
No. 11163

A  
Agenda 7

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT, SECOND DIVISION  
MAY TERM, A. D. 1958

SUSIE B. ANDERSON,  
Administrator of the Estate  
of Oliver W. Anderson, De-  
ceased,

Plaintiff-Appellee,

-VS-

JAMES GLASS,

Defendant-Appellant.

19 I.A. 2d 414

Appeal from the  
Circuit Court  
Henry County.

CROW, P. J.

This is an appeal by the defendant, James Glass, from a verdict and judgment for \$25,000.00 for the plaintiff, Susie B. Anderson, Administrator of the Estate of Oliver W. Anderson, deceased, in a wrongful death action, occasioned by the death of the plaintiff's intestate while he was driving a 1941 Ford. This Ford collided with the rear end of a 1935 Chevrolet truck driven by the defendant on January 2, 1956.

The defendant-appellant charges four errors, namely, that (1) the plaintiff's decedent was guilty of contributory negligence as a matter of law, (2) the verdict is against the manifest weight of the evidence, (3) the Court improperly allowed evidence of careful habits of the deceased, and (4) the



plaintiff's attorney in cross-examination of a defendant's witness injected the matter of insurance in the case.

We have made a careful review of the evidence in the record and it substantially discloses that the collision of the vehicles occurred about 5:15 p.m. on January 2, 1956, about five miles west of Galva, Illinois on U. S. Rt. 34, on a paved and blacktopped road, 22 ft. wide with an 8 ft. shoulder. The road was level and runs straight east and west. The defendant's truck was headed east and the plaintiff's intestate was driving alone due east, with no approaching traffic. Oliver W. Anderson, the plaintiff's intestate, age 46, was driving 60 or 65 miles per hour on the south half of the roadway at a point about 2½ miles prior to the collision. There was no eye witness to testify at this trial that he saw the collision. It was dusk at the time and getting darker, and the visibility was less than normal. The pavement was damp.

One of the principal witnesses called by the plaintiff was one Gerald Clark. He said that he was driving his car east on U. S. Rt. 34, was overtaken by the Anderson car about two miles back from the point of collision, and that he followed Anderson at a distance of some 500 feet. He saw Anderson's brake lights go on and out and then he saw no lights at all. He testified the tail light of the Anderson car was on at the time and that Anderson was in the south lane. Clark saw no other lights than the lights of the Anderson car. As Clark came up to within 20 ft. of the Anderson car and the point of collision he found the Anderson car just ahead of him and the

plaintiff's attorney in cross-examination of a defendant's

witness injected the matter of insurance in the case.

We have made a careful review of the evidence in the

record and it substantially indicates that the collision of

the vehicles occurred about 3:15 p.m. on January 12, 1934, when

two miles west of Galva, Illinois, U.S. 24, on a paved

and blacktopped road, 22 ft. wide with an 11 ft. shoulder. The

road was level and some slightly wet and icy. The defendant's

truck was headed east and the plaintiff's automobile was headed

along the east, with no apparent traffic. Driver of defendant,

the plaintiff's testimony, the car was traveling 30 or 35 miles

per hour on the south side of the road, and a point about 1/2

miles prior to the collision. There was no one in the car.

testify at this time that he was in the collision. It was dark

at the time and getting darker, and was raining, and that

night. The defendant was drunk.

One of the principal witnesses called by the plaintiff

was one Gerald Clark. He said that he was driving his car east

on U.S. 24, was overtaken by the defendant and about one

mile back from the point of collision, and that he followed

Anderson at a distance of some 50 feet. He saw Anderson's

brake lights go on and off and then he saw no lights at all.

He testified that light of the Anderson car was on at the

time and that Anderson was in the south lane. Clark saw no

other lights than the light of the Anderson car. As Clark

came up to within 20 ft. of the Anderson car and the point of

collision he found the Anderson car just ahead of him and the

defendant's truck on the north side of the pavement, headed northwest, probably about 16 ft. from the Anderson car. Clark found the defendant, Glass, out on the highway looking for material that had apparently spilled out of his truck prior to the collision. Anderson was found dead in his car. The end gate was out of the defendant's truck. The defendant had some channel irons about 8 ft. long and weighing about 100 lbs. each in his load, together with some furniture. The channel irons were found on the shoulder on the south side of the road about 50 or 100 ft. west of the beginning of the skid marks made by the plaintiff's intestate's car. Apparently these had fallen out of the defendant's truck some distance prior to the point of impact. The defendant's truck had 2" x 6" stringers nailed across the back end and back of the tail light, and two chains were circled around the stringers extending almost to the ground. An investigation at the scene of the accident showed that there were no reflector lights in operation on defendant's truck, that they had either been broken off previously or by the collision. There was no direct evidence that the defendant's tail light was in operation after the collision. The wiring that led from the front was bare of insulation in spots but was intact. There was evidence that the broken insulation could cause the tail light to go out if the wiring came in contact with the metal frame. Two witnesses for the defendant testified they saw the defendant's truck while he was driving on the road about 5:00 p.m. that day and that his truck had more than one red light and some stringer lights in operation. The skid marks from the Anderson car appeared to be about 107 ft. in length.

defendant's truck on the north side of the pavement, headed  
northwest, probably about 10:15. From the defendant's car, I saw  
found the defendant, Olin, and on the left of the truck  
material that had apparently spilled out of his truck. The car  
the collision. Anderson was found dead on his back. The car  
was out of the defendant's truck. The defendant had some changes  
from about 5 to 10 feet and was lying about 100 feet from the  
road, together with some furniture. The defendant's car was  
on the shoulder on the north side of the road about 100 feet  
to west of the beginning of the city limits. The defendant's  
left's intersection. Anderson's car was lying on the north side of the  
defendant's truck some distance to the west of the point of impact.  
The defendant's truck had a 10 foot wide wheel track. The  
back end and back of the left light, and two other were divided  
around the striking and being struck. The defendant's car was  
vestigation at the scene of the accident showed that there was  
no reflector light in operation on defendant's car, that  
they had either been broken off or disconnected at the collision.  
There was no direct evidence that the defendant's left light  
was in operation after the collision. The witness that had been  
the front was here of indication in spots but was broken. There  
was evidence that the front indicator could cause the car  
light to go out if the wiring came in contact with the metal  
frame. Two witnesses for the defendant testified they saw the  
defendant's truck while he was driving on the road about 5:00  
p.m. that day and that his truck had more than one red light  
and some stringer lights in operation. The skid marks from the  
Anderson car appeared to be about 100 feet in length.



There are other facts in evidence and from all the evidence we conclude the jury might find some conflicts in considering the circumstantial evidence. We believe, however, the jury was properly presented questions of alleged negligence, proximate cause, and contributory negligence for their determination. We are unable to come to the conclusion that the evidence here clearly requires an opposite conclusion to that reached by the jury: NIMAN v. PECATONICA LIVESTOCK EXCHANGE (1957) 13 Ill. App. (2d) 144, 151. The facts that this collision occurred when it was almost dark, the visibility was poor, the pavement was wet, and that apparently something had fallen out of the defendant's truck, and he was apparently looking for some part of his load on the highway, could readily lead the jury to believe that the defendant had stopped his truck on the highway. Whether this constituted negligence, when considered with the evidence as to the facts of the lights or no lights on the defendant's truck, and with the other circumstances in evidence, would be properly a question of fact for the jury. The evidence is, at best, conflicting as to whether there were any lights visible on the defendant's truck at the time of the collision. We believe the jury could reasonably find that the plaintiff's intestate was not guilty of contributory negligence and that the defendant was guilty of one or more acts of negligence charged in the declaration proximately causing the result.

There was, as we've said, no eye witness to the collision presented on the trial and we are of the opinion that Gerald Clark could not be so considered under the circumstances. He

There are other facts in evidence and from all of

them we conclude the jury might find some conflict in

the circumstantial evidence.

They have properly presented evidence of flight, and

proximate cause, and considered the evidence in

light of the evidence in the case.

There have clearly been no errors in the

reasoning of the jury.

(1937) 13 App. (2d) 127. 128. 129. 130. 131. 132.

occurred when it was shown that the defendant

was not, and that a separate trial was

the defendant's trial, and it was

part of his loss on the trial, and it was

believe that the defendant had

Whether this constituted negligence, when

valued as to the issue of the

defendant's truck, and with the other

would be properly a question of

it, as here, conflicting as to

valuable on the defendant's trial

we believe the jury would

therefore was not guilty of

the defendant was guilty of one or more

in the defendant's trial, and

There was, as we've said, no

presented on the trial and we

that could not be so considered

did not see the cars collide. The trial court, therefore, committed no error in allowing proof of careful habits of the plaintiff's intestate.

The defendant further urges that the Court committed error because the matter of insurance was injected by a defendant's witness on cross examination by the plaintiff's attorney. In response to the question: "Did anyone ever come to your home to talk to you about it?", the witness answered: "Yes". Then followed the question: "Who was that?". Then came the answer: "I didn't know the man, he was an insurance man." The answer was complete, of course, when the witness testified that he didn't know the man. The insurance element or characterization was clearly volunteered, was not called for by the question, and there is no basis for assuming that the statement was made as a deliberate attempt to prejudice the jury against the defendant: ISENHART vs. SEIBERT (1955) 6 Ill. App. (2nd) 220. Further, the reference to insurance was general in nature, and did not inform the jury that the defendant was protected by insurance: SPIES vs. SUSSMAN (1932) 264 Ill. App. 528; SMALLEN vs. ARONSON (1929) 253 Ill. App. 540. The court did not err in denying the defendant's motion to withdraw a juror and declare a mistrial on that account.

We find no reversible error, and the judgment will, therefore, be affirmed.

A F F I R M E D

*Wright, J. Concur.*  
Solfisburg, J. Concur.

did not get the same result. The total count, therefore, con-  
 sidered no error in all-out proof of capital nature of the  
 defendant's intention.  
 The defendant's intention was that the count should be  
 error because the nature of the count was not intended to be  
 defendant's witness as to the defendant's intention. It was  
 attorney. In response to the question "Did you intend to  
 to your name to take to the count?" the witness answered  
 "Yes". Then followed the question "Did you intend to  
 come the answer: "I did not intend to take to the count."  
 "Yes". The answer was a statement of intent, which the witness  
 testified that he did not intend to take to the count.  
 or characterization was clearly not intended to be intended  
 by the question, and there is no error for the count. The  
 statement was made as a statement of intent to prove the  
 jury against the defendant. People v. Smith (1933)  
 6 Ill. App. (2d) 230. Further, the witness to the count  
 was general in nature, and did not intend to take the de-  
 fendant was provided by People v. Smith (1933)  
 364 Ill. App. 230; People v. Smith (1933) 364 Ill. App. 230.  
 The court did not err in denying the defendant's motion to  
 draw a jury and declare a mistrial on this account.  
 We find no reversible error, and the judgment will,  
 therefore, be affirmed.

I T E M I D

Wright, J. Concur.  
 Solisburg, J. Concur.

430

A

47432

ALEXANDRA MUZYKA,

Appellant,

v.

BASIL MUZYKA, BASIL B. MUZYKA,  
AMELIA MUZYKA, PETER MUZYKA,  
THEODORE LUBEZNY, NETTIE LUBEZNY  
and POLISH NATIONAL ALLIANCE OF  
THE UNITED STATES OF NORTH  
AMERICA, a corporation,

Appellees.

APPEAL FROM SUPERIOR  
COURT, COOK COUNTY.

19 I.A.<sup>2d</sup> 415

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for separate maintenance and to impress a trust on certain property. Subsequently the complaint was amended to one for divorce on the ground of desertion. Defendant Basil Muzyka filed an answer denying the allegations of the complaint and also filed a counterclaim for divorce, alleging that plaintiff was guilty of wilful desertion. The cause was referred to a master, who made his report finding that plaintiff had refused to live with defendant since August 16, 1954, and had made no effort to bring about a reconciliation; that when plaintiff had failed to return to defendant's home at the end of the summer of 1954 she was guilty of having wilfully deserted and absented herself from defendant without any just cause or provocation, and that there was no duty or obligation on the part of defendant to live with plaintiff in Barrington, Illinois, with plaintiff's daughter, son-in-law, and their family, as plaintiff wished. The master recommended that a decree of divorce be entered in favor of defendant (counterplaintiff) and that the other issues pertaining to the property rights of the parties be rereferred



to a master. The master set a date for the hearing of objections to his report, but no objections were filed. Exceptions were filed to the report. The exceptions were overruled, and the court entered a decree in accordance with the recommendations of the master.

The report of proceedings before the master shows that there was introduced before him a considerable amount of evidence, none of which appears in the abstract, except a letter written by defendant to plaintiff, which proposes reconciliation upon certain conditions. It is plaintiff's contention that the letter has no value because of the conditions it imposes, and that it is discredited because defendant kept a copy thereof. These are matters which may be determined only by a consideration of all the evidence, none of which is abstracted. However, this being a divorce matter, we have examined the record sufficiently to see that there was a substantial basis for the finding of the master and the decree of the court. The decree is accordingly affirmed.

Decree affirmed.

McCormick, P. J., and Robson, J., concur.

Abstract only.





31  
47578

NO. 4 NIXON-GLENVIEW CO.,  
NIXON-GLENVIEW DEVELOPMENT  
HOMES ASSOCIATION, NIXON-  
GLENVIEW DEVELOPMENT CO.,  
and NIXON HOMES, INC.,

Plaintiffs-Appellees,

v.

RUTH S. WILDER, JOHN J. KING,  
HARRINGTON J. PIERCE and  
COSMOPOLITAN NATIONAL BANK  
OF CHICAGO, as Trustee under  
Trust No. 7232,

Defendants,

HARRINGTON J. PIERCE and  
COSMOPOLITAN NATIONAL BANK  
OF CHICAGO, as Trustee under  
Trust No. 7232,

Certain Defendants-Appellants.

A  
INTERLOCUTORY

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

19 24 16

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

A motion to dismiss the appeal was filed and was taken with the case. Upon submission of the case on briefs and oral argument, we have come to the conclusion that the appeal should be dismissed.

The appeal is from an interlocutory order entered after due notice and a hearing at which all parties were present by their counsel. An order was entered granting a temporary injunction and at the same time the court continued the matter for a fuller hearing, evidently desiring to preserve the status quo until the case could be fully argued. The record was filed in the Appellate court more than 30 days after entry of the order. No extension of time for such filing was granted by the Appellate court or a judge thereof. It is



-2-

urged that the record was not filed in time.

Section 78 of the Civil Practice Act governs the practice on appeals from interlocutory orders "granting, modifying, refusing, dissolving or refusing to dissolve or modify an injunction...." This statute provides that such appeals may be taken provided the appeal is perfected in the trial court and the record is filed in the Appellate court within 30 days from the entry of the interlocutory order or decree and provided, further, that the time for filing the record may be extended by the Appellate court or a judge thereof in vacation. An exception to the requirement that the record be filed in 30 days is made where the interlocutory order or decree is entered on an ex parte application. In such case the party intending to take the appeal shall first present a motion to vacate the order or decree, and the appeal may be taken if the motion is denied or if the court does not act thereon within seven days after its presentation. In such a case the 30 days allowed for taking the appeal and filing the record begins to run from the day the motion to vacate is denied or from the last date for action thereon; that is, not less than 7 days after presentation. It is thus clear that unless the order appealed from was entered ex parte, the record was not filed in this court in time.

The term "ex parte" has been defined in two cases in this District. In Stella v. Mosele, 299 Ill. App. 53, an appeal was taken from an interlocutory order appointing a

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-3-

receiver. The plaintiff-appellee argued in the Appellate court that the application for a receiver was an ex parte application and the defendant did not as a condition precedent to his right of appeal present a motion to vacate the order in the trial court as required. Notice of the motion for a receiver had been served and the parties appeared in opposition thereto. An order was finally entered, after a number of continuances, at which time the defendants were present and objected to the appointment. The Appellate court concluded that the rule and the reason underlying it were intended to apply only to ex parte proceedings in fact and not to causes where notice was served and the opposing party appeared and objected to the appointment. That case was qualified somewhat by Kimbrough v. Parker, 336 Ill. App. 124, wherein the Appellate court held that the order was in fact entered ex parte even though notice of the hearing had been served. In that case the complaining party did not appear when the motion was presented.

In the instant case the defendants did appear and did object at the time the order was entered, as in Stella v. Mosele, supra. They should have filed the record in this court within 30 days from the date the order was entered.

Appeal dismissed.

McCormick, P.J., and Robson, J., concur.

Abstract only.

Abstract only.

Re: Corrigendum

2000

432  
47446

VICTOR S. URANOWSKI, JR., by VICTOR  
URANOWSKI, his father and next friend,

Plaintiff,

v.

ISLAND HOMES, INC., THE PENNSYLVANIA  
RAILROAD COMPANY, INDUSTRIAL CINDER  
COMPANY, INC., and INDIANA HARBOR BELT  
RAILROAD COMPANY,

Defendants,

\_\_\_\_\_  
THE PENNSYLVANIA RAILROAD COMPANY, a  
corporation,

Counterclaimant-Appellant,

v.

INDUSTRIAL CINDER COMPANY, a corporation,

Counterdefendant-Appellee.

A  
APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

19 I.A.<sup>21</sup> 478

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action to recover for the injuries, by fire, to the minor plaintiff. Defendants answered and The Pennsylvania filed a counterclaim against the Industrial Cinder Company based on an immunity-from-liability covenant between them. The counterclaim was stricken on motion of Industrial Cinders and The Pennsylvania has appealed.

In April, 1958, Island Homes was owner of swamp land being filled and levelled. The Pennsylvania and Indiana Harbor Railroads were cooperating in the work by transporting carloads of cinders and other materials which were unloaded on the property, from cars on the adjoining railroad tracks, for filling the land.





The complaint alleges that the piles of unloaded materials were "continually burning"; that children were allured by this condition; that plaintiff, who was nine years old at the time, while playing about the material suffered severe burns when his clothing caught fire; and that his injuries were due to the negligence of the defendants.

The Pennsylvania answered and its Affirmative Defenses stated its "only function was to deliver cars consigned to Industrial Cinders. . . and that said cars were unloaded exclusively by the consignee. . ." and that it had no duty to plaintiff which it breached. It also filed a counterclaim against Industrial Cinders alleging an agreement between it and Industrial Cinders engaging the latter to unload the cinders onto the swamp land; and setting forth a covenant binding Industrial Cinders to "save and keep harmless the Pennsylvania. . . from any and all liability in connection with the unloading. . . ." It "demands judgment against. . . Industrial Cinders, requiring it to indemnify and save harmless the Pennsylvania. . . from all expenses, counsel fees, costs, liabilities. . . judgments and executions which may be sustained or incurred by reason. . ." of the complaint.

Industrial Cinders moved to strike and dismiss the counterclaim on the grounds that the agreement "applied solely" to the unloading of the cars while the complaint charges  
in  
negligence, starting, and failure to guard, fires; and that The



-3-

Pennsylvania cannot contract for indemnity against its own negligence.

The trial court dismissed, and ordered judgment against The Pennsylvania on, the counterclaim. The question is whether the order and judgment are proper.

The complaint alleges the burning of the piles of materials and the evidence may show that the materials were burning when unloaded and piled. The trial court might on the evidence decide that Industrial Cinders was negligent and The Pennsylvania not negligent or vice versa. In other words there are several possible conclusions to the trial which would bear on the court's construction of the unloading agreement as well as the amount involved in the dispute between Industrial Cinders and The Pennsylvania. For this reason we think the trial court's order was erroneous as premature.

For the reasons given we think that the rule against construing an indemnity agreement to protect one against his own negligence in the absence of clear language in the agreement (Westinghouse Co. v. Building Corp., 395 Ill. 429), gleaned from the instrument as a whole (Cerny-Pickas & Co. v. Jahn Co., 7 Ill.2d 393), is not controlling.

The judgment is reversed and the cause remanded with directions to deny the motion to strike and dismiss without prejudice to the right of Industrial Cinders to include the defense in its answer to the counterclaim.

REVERSED AND REMANDED  
WITH DIRECTIONS.

LEWE, P.J., AND MURPHY, J., CONCUR.

ABSTRACT ONLY.



3  
47597

CHILLI-O SALES, INC., a  
corporation,

Appellee,

v.

JULIUS LOCKMAN,

Appellant.

A  
INTERLOCUTORY APPEAL

FROM SUPERIOR COURT

COOK COUNTY.

19 I.A.<sup>2d</sup> 479

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from a temporary injunction granted upon notice and plaintiff's bond. It restrains defendant from vending and selling certain types of frozen foods within the confines of the City of Chicago.

The complaint alleges that plaintiff, Chilli-O Sales, Inc., a corporation, is engaged in the manufacture and sale of certain types of frozen foods in Chicago; that it sells and vends its products through the medium of "so-called franchise owners and dealers"; and that on December 6, 1957, it entered into an agreement (made a part of the complaint) with Julius Lockman, defendant, whereby Lockman became the owner of a franchise covering a specified portion of the south side of Chicago and known as Route No. 3, which included a number of accounts purchasing plaintiff's products and a 1954 Chevrolet truck.

The agreement further provided:

"Upon the termination of this Agreement, whether by the terms hereof, by its cancellation, or in any other manner whatsoever, the Dealer does hereby covenant in consideration of the granting of this franchise to him and for other good and valuable consideration, the

THE  
OFFICE  
OF THE  
SHERIFF  
OF THE  
COUNTY OF  
HARRIS  
AND  
THE  
JAIL  
HOUSE

receipt of which is hereby acknowledged, that he will not, directly or indirectly, for a period of three (3) years thereafter engage as principal, proprietor, partner, servant, agent, broker, or hold stock in any corporation in any business or vocation similar or analogous to that of the Manufacturer at any point within the confines of the City of Chicago, whether by soliciting accounts within said territory or selling any and all merchandise similar to the kind sold by the Manufacturer."

It is further alleged that on June 6, 1958, the parties terminated the agreement and adjusted accounts; that since June 6, 1958, defendant is engaged in the vending and sale of frozen foods "substantially identical with and competitive with the products of plaintiff"; and that defendant is soliciting and directing plaintiff's customers to use products manufactured by others and is depriving plaintiff of large profits and causing damages, the exact amount of which cannot be ascertained. The agreement does not contain a fixed term, neither does it specify the quantities which plaintiff shall sell or which defendant shall buy.

On July 2, 1958, the temporary injunction order was entered. On July 7, 1958, defendant filed a motion to strike and dismiss the complaint, and on July 8 he filed a motion to dissolve the temporary injunction. On July 24, 1958, the court denied the motion to dissolve, and it is from that order the appeal is taken.

The motion to dissolve alleges the complaint does not state a cause of action, that the agreement is unilateral and lacking in mutuality, and the area restricted by the agreement is greater than necessary.





The principal question is whether the complaint presents facts and circumstances which lead to a belief that probably the plaintiff will be entitled to relief (Lee v. Hansberry, 291 Ill. App. 517, 521 (1937)), and whether the temporary injunction was probably necessary to preserve matters in status quo until the court has had an opportunity to consider the cause on its merits. O'Brien v. Matual, 14 Ill. App. 2d 173, 186 (1957).

The granting or refusing of a temporary injunction rests largely in the discretion of the chancellor, and the applicant is not required to make out a case which will entitle him, at all events, to relief at the hearing. It is enough if he can show that he raises a fair question as to the existence of the right which he claims and can satisfy the court that matters should be preserved in their present state until such questions can be disposed of. Nestor Johnson Mfg. Co. v. Goldblatt, 371 Ill. 570, 574 (1939).

Defendant's principal contention is that an agreement which lacks mutuality is invalid and unenforceable. The complaint shows the agreement was in force and effect for seven months. Want of mutuality is no defense where the contract has been fully performed. (Elmore Real Estate Improvement Co. v. Olson, 332 Ill. App. 475, 479 (1947).) Restrictive covenants similar in nature to the instant one, if not injurious to the public interest and reasonably limited in time and space, are valid and may be considered in equity. (Smithereen Co. v. Renfro, 325 Ill. App. 229, 237, 238 (1945).) If it be regarded that the instant agreement is indefinite as to duration and quantities, still it is an



-4-

established principle of law that an agreement, too indefinite and vague for enforcement at its inception, may be made definite by performance. (Smithereen case, page 244.)

Defendant also argues that a restrictive covenant which is oppressive, imposes undue hardship or is greater than reasonably necessary to protect plaintiff's business, is invalid and unenforceable. We do not believe this argument is applicable on a motion to dissolve a temporary injunction. What is reasonable is to be determined from the facts, upon issue properly made. This also applies to defendant's contention that the termination agreement is to be construed as a rescission which completely extinguished the contract, including the restrictive covenant relied on--it is a question of fact depending on what was said and done when the termination agreement was made.

We believe the complaint and agreement warranted the use of the discretionary powers of the chancellor and presented facts and circumstances sufficient to justify a belief that probably the plaintiff will be entitled to relief and that the temporary injunction was probably necessary to preserve matters in status quo until the court has had an opportunity to consider the cause on its merits. We find no abuse of the chancellor's discretion.

Therefore, the order of the chancellor, denying the motion to dissolve the temporary injunction, is affirmed.

ORDER AFFIRMED.

LEWE, P.J., AND KILEY, J., CONCUR.

ABSTRACT ONLY.



### Agenda 3

APPELLATE COURT OF ILLINOIS

OCTOBER TERM, A.D. 1958

PATL V. WUNDER  
Second District

9-1-24 490

Appellant.

The plaintiff and his former landlady testified in his behalf and the defendant only, appeared in her behalf. At the conclusion of the hearing, the court found the issues for the plaintiff and awarded him a decree of divorce based upon the desertion of the defendant.

1st Division

IN THE

FEDERAL COURT OF THE UNITED STATES

FILED

U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA  
CLERK OF COURT

PAUL A. WUNDERLICH  
Clerk of Court

084-2-01

HOWARD SPICER,  
Plaintiff,  
vs.  
GERTRUDE SPICER,  
Defendant.

DIVISION--P. 1.

Howard E. Spicer filed a complaint for divorce, alleging that Gertrude Spicer, his wife, was guilty of willful desertion so as to entitle him to a decree for divorce. The court called for trial before the court without a jury on plaintiff's complaint and defendant's answer denying all the material allegations. The plaintiff and his former husband testified in his behalf and the defendant only, appeared in her behalf. At the conclusion of the hearing, the court found the issues for the plaintiff and awarded him a decree of divorce based upon the desertion of the defendant.

The defendant perfected her appeal from the decree of divorce, and the plaintiff has not chosen to appear in this court. In her appeal, the defendant contends that the decree is against public policy, that the plaintiff was in fact the deserter, and that the plaintiff was not an innocent party and so, not entitled to a divorce.

Briefly reviewing the evidence for the plaintiff, it appears that the parties resided in Crystal Lake, Illinois; that on June 20, 1955, the plaintiff took a sleeping room in a local hotel because he was unable to sleep at home due to late hours kept by his wife and her visitors; that he kept many of her personal belongings at the marital domicile and returned home each day; that in July, 1955, while confined in the county jail on a non-support charge, the defendant and her children moved to Chicago where she enrolled the children in school; and that defendant refused to return to the marital domicile even though requested to do so. Plaintiff testified that he had treated his wife kindly and affectionately, did not beat her up, supported her, and gave her no reason for leaving him.

Plaintiff's landlady stated that the defendant left the marital domicile while the plaintiff was confined in the county jail and that when the plaintiff was released from jail in the middle of August, 1955, his rent was in arrears about two weeks.

Defendant admitted that she moved from the marital domicile on July 28, 1955, and returned in August for the remainder of her personal belongings, that she and the children moved to Chicago where she enrolled them in school. She stated in justification of her actions, that plaintiff had on occasions struck her; that he told her not to come back; that he was not

The defendant testified that the decree of divorce and the plaintiff had not chosen to appear in this court. In her appeal, the defendant contended that the court is in error in its public policy, that the plaintiff was in fact the defendant, and that the plaintiff was not an innocent party and so, the court should grant a divorce.

After reviewing the evidence for the plaintiff, it appears that the parties resided in Chicago, Illinois, from June 20, 1955, the plaintiff took a telephone call in a hotel because he was unable to find a room in the city. He was kept by his wife and her visitors; that he was not a party to the defendant's conduct in the hotel. The defendant testified that on July 1, 1955, while confined in the county jail on a non-support charge, the defendant and a friend visited the Chicago where the defendant's children in custody. The defendant refused to return to the hotel. The defendant requested to be released. He still testified that he and the defendant's kind and affectionate, did not have a relationship, supported her, and gave her no reason for leaving him.

Plaintiff's lawyer testified that the defendant left the marital domicile while the plaintiff was confined in the county jail and that when the plaintiff was released from jail in the middle of August, 1955, his rent was in arrears about two weeks. Defendant admitted that she moved from the marital domicile on July 28, 1955, and returned in August for the remainder of her personal belongings, that she and the children moved to Chicago where she enrolled them in school. She testified in justification of her actions, that plaintiff had on occasions struck her; that he told her not to come back; that he was not



going to pay any more rent on the house; that he failed to support her after June 20, 1955; and that another woman was involved.

Defendant urges that public policy of Illinois favors maintaining the family relation, and that the chancellor should not have awarded the decree of divorce. Public policy does favor the maintenance of the marital relationship, but at the same time, there is placed upon the parties to the marital contract, the obligation to live together as husband and wife. When either of the parties to the contract fail in this respect without justification, for a period of one year, then, and in that instance, the legislature has determined that the marital relationship should be dissolved. In this case, the chancellor has found that the defendant failed in her obligation to live with her husband.

There is no conflict in the evidence that the defendant together with her children left the marital domicile on July 28, 1955, more than one year before the filing of plaintiff's complaint on January 8, 1957, and did not thereafter return. Her uncorroborated evidence for justifying her actions is denied or explained.

From the evidence, defendant contends that the decree must be reversed. The fallacy of this argument is that the matter was heard and determined by the Chancellor who was in a superior position to weigh the testimony. We cannot say that the decree is against the manifest weight of the evidence. The weight of the evidence and the credibility of the witnesses is for the trier of the fact. In LaSalle National Bank v. County of Cook, 12 Ill. 2d. 40, the court said, "The triers of fact are in a superior position to that of the reviewing court in such a situation. When testimony is contradictory in a trial without a

going to pay my rent on the house; and he failed to support her after June 20, 1955; and that another woman was involved.

Defendant urges that public policy of Illinois favors maintaining the family relation, and that the chancellor should not have awarded the decree of divorce. Public policy does

favor the maintenance of the marital relationship, and at the same time, there is placed upon the parties to the marital relationship, the obligation to live together as husband and wife. This, either of the parties to the contract that is this marital relationship, for a failure of one party to do so, and in such instances, the legislature has determined that the marital relationship should be dissolved. In this case, the chancellor found that the

defendant failed in her obligation to live with her husband. There is no conflict in the evidence as to the defendant

together with her children left the marital domicile on July 2, 1955, more than one year before the filing of plaintiff's complaint on January 8, 1957, and did not thereafter return. Her whereabouts exacted evidence for investigating her actions is limited or withheld. From the evidence, defendant contends that the divorce

must be reversed. The failure of this argument is that the matter was heard and determined by the chancellor who was in a position to weigh the testimony. We cannot say that the decree is against the manifest weight of the evidence. The weight of

the evidence and the credibility of the witnesses is for the trier of the fact. In Illinois National Bank v. County of Cook, 12 Ill. 2d 40, the court said, "The trier of fact is in a superior position to that of the reviewing court in such a situation. When testimony is contradictory in a trial without a

jury, the weight to be accorded testimony is a matter to be determined by the trial court and its findings will not be disturbed unless manifestly against the weight of the evidence."

The decree of the trial court is affirmed.

Decree Affirmed.

Dove--J. concurs

McNeal--J. concurs



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47368

THE BELIEVERS OF ISLAM, INC., a  
corporation not for profit, and  
ELIJAH MOHAMMED,

Plaintiffs - Appellees,

v.

THE CITY OF CHICAGO, a municipal  
corporation,

Defendant - Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

19 I.A. 480<sup>2</sup>

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiffs filed a complaint for declaratory judgment involving a zoning ordinance of defendant City. Defendant's motion to strike and dismiss the complaint was denied. It elected to stand on its motion whereupon the trial court entered judgment in favor of plaintiff. Defendant appeals.

The complaint alleges in substance as follows: that the Believers of Islam Inc., a religious corporation, acquired the premises adjacent to each other known as 5333 and 5345 South Greenwood Avenue in the City of Chicago, Illinois. Prior to its acquisition by plaintiff corporation the building at 5345 South Greenwood Avenue was used as a synagogue and the other building as a religious school and community center. The synagogue had inscribed across the entire front of the building two six point stars and its name. The school and community center building had large letters cut in stone bearing the name of the institution. After acquiring the premises plaintiffs obliterated the names on both buildings and placed its signs in the same space, totaling an area of 25 square feet each.

The first of these is the  
 fact that the  
 results of the  
 experiments  
 have been  
 very different  
 from those  
 which have  
 been obtained  
 in the case of  
 the other two  
 experiments.

The zoning ordinance provides that a sign on a church or school building shall not exceed 12 square feet in area.

The complaint further alleges that when defendant construed the zoning ordinance so as to prevent plaintiff corporation from free enjoyment of its property and the right to maintain signs aforesaid, said plaintiff sought relief by applying through Elijah Mohammed on June 5, 1956, for a variation of the zoning board of appeals in calendar number 447-56-Z, and that the board of appeals denied relief to plaintiffs.

The pertinent part of the answer avers that it appears on the face of the complaint that plaintiff applied for variation before the zoning board of appeals of the City of Chicago on June 5, 1956, in cause numbered 447-56-Z; that upon evidence being taken and a full hearing had on the merits said zoning board of appeals denied plaintiff's application for a variation; that plaintiff has failed to exhaust its administrative remedies as set forth in chapter 24 § 73-3d and 73-6.01 and chapter 110 § 264-65 of the Illinois Revised Statutes, and that it can not seek to invoke the aid of this court at this time in aid of a declaratory judgment..

Defendant's sole contention is that plaintiffs must exhaust their administrative remedies before seeking a declaratory judgment. The City says this was a final administrative decision and was judicially reviewable under the Administrative Review Act. We agree. Section 73-6.01 of the Cities and Villages Act, Ill. Rev. Stat. 1957, ch. 24 § 73-6.01, provides that: "All

III. For the year 1957, the Commission has received  
 from the Government of India, the following information  
 and has taken into consideration the same in its  
 judgment.



-3-

final administrative decisions of the board of appeals under this Article shall be subject to judicial review pursuant to the provisions of the 'Administrative Review Act'.<sup>10</sup> Thus when the plaintiff's petition for a variation was denied the decision of the board of appeals was subject to review and unless review was sought within the time and manner provided, the parties to the proceeding before the administrative agency are barred. Ill. Rev. Stat. 1957, ch. 110 § 265.

In Sheridan Shores Inc. v. City of Chicago, 13 Ill. App.2d 377, the court said at page 384:

In the instant case we have directly involved, the question whether defendant was justified in denying plaintiffs' application for a permit, as alleged in the complaint and answer, and whether the Zoning Appeal Board, to whom plaintiffs appealed, was justified in deciding in effect that plaintiffs' conduct of their business was in violation of the Zoning Ordinance, and that they were not entitled to any variation. The Zoning Appeal Board having so decided, the Administrative Review Act specifically applies to a review of its decision and makes ample provision for appeal to the courts in such review.

See Bank of Lyons v. County of Cook, 13 Ill.2d 493 and Bright v. City of Evanston, 10 Ill.2d 178. Plaintiff has placed great reliance on Stemwedel v. Village of Kenilworth, 153 N.E.2d 79 and First Nat. Bk. & Tr. Co. v. County of Cook, No. 34754. The Stemwedel case was a suit by a residence owner to enjoin the Village from enforcing a zoning ordinance prescribing a minimum rear yard depth of 25 feet. The court said at page 81 that:

It is undisputed that the plaintiff sought to appropriate relief both before the board of appeals and from the village authorities. Having applied in the first instance for administrative relief he is entitled to maintain the present suit. See Bright v. City of Evanston, 10 Ill.2d 178, 186, 139 N.E.2d 270. And since it is an original



action for independent relief, rather than a proceeding to review the denial of a variation, the provisions of section 2 of the Administrative Review Act, Ill. Rev. Stat. 1957, ch. 110, §265, making a proceeding thereunder the exclusive method of "review", do not constitute a bar.

In First Nat. Bk. & Tr. Co. v. County of Cook, the land in controversy was in an unincorporated area. The county zoning act provides that determination by the board of appeals on applications for variations are not final but may be reviewed, changed or referred back for additional hearing by county authorities. Ill. Rev. Stat. 1957, ch. 34, § 152k.1. Therefore the statute can have no application to land not within any municipality.

In short the power of the board of appeals to grant or deny a variation is a final reviewable order subject to review under the Administrative Review Act. Hence it follows that the board of appeals having denied the petition for variation, plaintiff's remedy was an action for administrative review.

Since this is the exclusive remedy for judicial review, we are impelled to hold that the suit for declaratory judgment will not lie. For the reasons given the judgment is reversed.

REVERSED.

MURPHY AND KILEY, JJ., CONCUR.

ABSTRACT ONLY.

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HELEN WALTER,

Plaintiff - Appellee,

v.

ILLINOIS CENTRAL RAILROAD COMPANY,  
a corporation,

Defendant - Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

19 I.A.<sup>2d</sup> 481

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is a personal injury action. Judgment was entered on a verdict for plaintiff for \$15,000. Defendant's post trial motions were overruled. Defendant appeals.

On the morning of November 26, 1954, plaintiff boarded one of defendant's local suburban trains at the 79th Street South Shore Station in the city of Chicago. After plaintiff realized she was on a local train, she had a conversation with the conductor who informed her that a special train immediately behind the local would arrive at her destination about five minutes earlier than the local. As the train reached 71st Street about 7:15 A.M., plaintiff prepared to alight and transfer to the special train. As she alighted she fell and injured herself.

The 71st Street South Shore Station platform is about 15 feet wide and 400 feet long, made of wood and covered with a canopy which extends to about three feet from the edge of the platform. There was no sand or other abrasive on the platform on the morning of the mishap. The platform and its maintenance were under defendant's control.



A weather report showed: "For November 25, 1954, from noon to midnight ranging from a high of 42° to a low of 32°; ~~for~~ for November 26, 1954, from a high of 31° to a low of 26° at 6 A.M." At the time of plaintiff's injury the temperature was 28°. Precipitation reported as snow from 5:15 A.M. to 9:12 A.M. on November 25, 1954; rain from 11:54 A.M. to 12:42 P.M. and from 5:02 P.M. to 6 P.M. It had not rained nor snowed since 6 P.M. the night before the mishap.

Defendant contends that there was "no credible evidence" in the record to establish the charge of negligence. Defendant also claims that plaintiff failed to affirmatively show that she was in the exercise of due care for her own safety and was therefore guilty of contributory negligence. On these questions we consider only the evidence favorable to plaintiff with the legal inferences drawn most strongly in plaintiff's favor; disregard contradictory evidence and decide whether there is any evidence to prove imprudence on defendant's part. Melford v. Gaus & Brown Const. Co., 17 Ill. App.2d 497; Nagle v. City of Chicago, 15 Ill. App.2d 533; Mahan v. Richardson, 284 Ill. App. 493.

Plaintiff testified that she was wearing two inch heels on her shoes and carrying a purse and a package at the time of the occurrence. As the rear door opened she observed an accumulation of ice two or more feet wide along the outside edge of the platform, varying in depth from one-eighth to one-quarter of an inch. When the train was completely stopped she took a "large" step with her right foot in order to step over the 15 inch opening





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between the car and the platform and the accumulation of ice. As she brought her left foot forward her right foot slipped, causing her right leg up to the knee to become wedged between the car and the platform. Witness Grabarczyk, also a passenger, testified that plaintiff slipped on the ice.

We think this evidence is enough to take the case to the jury and supports the jury's conclusion that an accumulation of ice caused the injury.

Defendant maintains that the verdict on questions of liability and damages was against the manifest weight of the evidence. The record shows that plaintiff and witness Grabarczyk, also a passenger, testified that plaintiff slipped on an accumulation of ice on the platform. Defendant's witnesses controverted this by claiming there was frost not ice on the platform. This conflicting testimony presented a question of fact. By not removing the ice or placing an abrasive on it defendant created a dangerous condition. In finding for the plaintiff it is clear that the jury considered her free from contributory negligence and there is ample evidence to justify this inference. Even though we might not reach the same conclusion as the jury did, the verdict can not be set aside unless it is clearly against the manifest weight of the evidence and the verdict here is not subject to that criticism. See Schneiderman v. Interstate Transit Lines, Inc., 331 Ill. App. 143.

Equally without merit is defendant's contention that the damages awarded by the jury were against the manifest weight of

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the evidence. When plaintiff was injured she was 44 years old and enjoying good health. She was a telephone operator for two years preceeding the injury and was earning \$60. per week. That the injuries were causally connected with the occurrence was amply proved. The evidence showed a narrowing of the fifth and sixth cervical vertebrae; and that the posterior neck muscles were soft and tender. The doctor examining plaintiff on behalf of defendant about two years after the occurrence found a limitation of motion in the neck and head. Although there was some conflict in the testimony we think the evidence is sufficient to support the jury's award.

Defendant also complains that the trial court erred in admitting "speculative" medical testimony and certain rebuttal testimony. Defendant says that these errors permitted the jury to consider improper elements in assessing damages and that the verdict is therefore excessive. We do not agree. The medical testimony related to the extent of future care required by plaintiff and the permanency of her injuries. Physicians are permitted to testify as to whether a permanent injury has been sustained. Goad v. Grissom, 324 Ill. App. 123; see also Dinger v. Rudow, 13 Ill. App.2d 444. Perhaps the testimony as to future care was in some respects speculative since "it might or might not" be needed. However, we do not think that this was erroneously prejudicial.

The rebuttal testimony offered by plaintiff purported to impeach a non-party witness and establish that she was in plaintiff's employ after she had testified that she was not paid.

plaintiff's employer after she had testified that she had not paid.  
 so imposed a non-party who is not a party to the suit.

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Even if this was error, which we do not decide, it would not be substantial enough to warrant a reversal as the amount involved is negligible.

It is a well settled rule that a record need not be free from error and a judgment will not be upset unless the alleged errors are prejudicial to the complaining party. Hulke v. International Mfg. Co., 14 Ill. App.2d 5. The record of this case does not justify any inference that prejudicial error was committed and defendant has not shown that the result below would have been any different if the evidence complained of was excluded. In our opinion defendant's contentions on the damages question are without merit.

Defendant contends that the trial court erred in not permitting cross-examination of plaintiff on certain inconsistencies between her petition to advance her case on the trial calendar and her direct testimony. The scope and extent of cross-examination is a subject within the trial court's discretion, and unless that discretion is clearly abused with prejudice to defendant, a court of review will not interfere with the trial court's ruling. People v. Halteman, 10 Ill.2d 74; People v. Provo, 409 Ill. 63; Green v. Keenan, 10 Ill. App.2d 53. See also 37 I. L. P., Witnesses § 112-13. Since plaintiff admitted signing and swearing to the petition after it was read to the jury, defendant could not make further inquiry as to its contents as the language in the document speaks for itself and further proof thereof is unnecessary and improper. Gerrard v. Porcheddu, 243 Ill. App. 562. In any event, defendant has not



shown that the trial court abused its discretion to defendant's prejudice.

Defendant urges that the trial court erred in giving plaintiff's instruction P-1 and refusing defendant's instruction D-20. The main objection to plaintiff's instruction is that it embodies most of the complaint and answer. Although "complaint" instructions are not favored, they are seldom a ground for reversal. See Schneiderman v. Interstate Transit Lines, Inc., 401 Ill. 172; Pinkerton v. Oak Park Nat. Bank, 16 Ill. App.2d 91; Peterie v. Thompson, 10 Ill. App.2d 100. Though not in the best form instruction P-1 is not subject to the criticism found in Signa v. Alluri, 351 Ill. App. 11. The instruction here is much shorter and is not so unfair to defendant as to require a reversal.

Finally, defendant insists that refusal of its tendered "accident without fault" instruction (D-20) was reversible error. We do not agree. Defendant's answer denies negligence on its part and avers plaintiff's contributory negligence. As was said in Smith v. Johnson, 2 Ill. App.2d 315 at page 320:

The giving of this instruction should be discouraged. It is only when there is evidence tending to show that plaintiff was injured through accident alone, not coupled with negligence, that the giving of such instruction is permissible.

"This instruction is also objectionable as the question of pure accident comes merely from suggestion and not from the evidence." Crutchfield v. Meyer, 414 Ill. 210, 213. See also Hawbaker v. Danner, 226 F.2d 843.





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Considering all of the instructions we think the law of the case was fairly presented to the jury. As set out in Duffy v. Cortesi, 2 Ill.2d 511, and reiterated in Pinkerton v. Oak Park Nat. Bank, 16 Ill. App. 91 at page 108, the modern trend:

. . . reveals a reluctance to reverse cases on the ground of technical errors in instructions; . . . instructions will be considered as a whole, and where the jury has not been misled, and the complaining party's rights have not been prejudiced by minor irregularities, such errors will not be deemed grounds for reversal.

For the reasons given the judgment is affirmed.

AFFIRMED.

MURPHY AND KILEY, JJ., CONCUR.

ABSTRACT ONLY.



44  
47457

INVESTORS COMMERCIAL CORPORATION,

Plaintiff - Appellee,

v.

THOMAS SUMLIN,

Defendant - Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

19 I.A.<sup>24</sup> 482<sup>7</sup>

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This appeal is from an order confirming an original judgment of \$782.25 confessed on a note. The original judgment was set aside on defendant's motion and he was permitted to file a defense of forgery. Testimony was given under the defense and the trial court confirmed the original judgment.

The note for \$660.00 was made July 23, 1956, to the plaintiff's order. It was payable in twelve monthly installments of \$55.00 with interest. And it bears a handwritten signature of Thomas Sumlin.

The sworn petition to set aside the judgment stated that defendant had examined the signature on the note; that it was not his; that he had not authorized anyone to sign the note for him; that he did not know who signed it; that the signature was a forgery; that he had no dealing with plaintiff when the note was made; and had no knowledge of the making of the note, and received no money or other consideration for the note.

After the judgment was confirmed, defendant filed another sworn petition to vacate on the grounds that the making of the note was a fraud by an employee of plaintiff without defendant's knowledge; that the note transaction involved "certain

of the note was a favor by an expert in  
defendant's knowledge; that the note was  
another sworn part of the evidence  
received by the jury.

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articles allegedly delivered to E&B Boosters Club" about which defendant knew nothing and with which he had nothing to do; and that the court had put on defendant the burden of proof and had entered judgment though no rebuttal proof was made by plaintiff.

The evidence tended to show that the note was filled out by a salesman for the National Beverage Control System, in payment for "whiskey pourers" and that the purchase was for the Boosters, whose president then was the defendant. Defendant denied being president of the Boosters at the time but his witness, operating manager of the Boosters, testified that defendant was president, and a letter in evidence from the Secretary of State to plaintiff discloses this fact. There was testimony by that witness that defendant was not present when the note was signed, did not sign it, and had nothing to do with the "affair". He also said he did not sign the note and that, although no one was present when the note was signed except he and the salesman, he did not know who signed the note. He later said the salesman signed it. But defendant's attorney stated to the court that the witness did not know who signed the note. This witness also said that defendant knew nothing about the note even though the witness, as manager, had made a payment under the contract of purchase in connection with which the note was given.

The vital question for the court was whether defendant's signature on the note was a forgery. Defendant had the burden of proof on the issue, Belmont-Central Exchange, Inc. v. Jacobs, 322 Ill. App. 523; Kaddatz v. Stevens, 350 Ill. App. 260. No

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presumption from failure of plaintiff to produce witnesses on the issue arises in favor of defendant. The defendant was in better position to prove forgery.

The court found that the signature was not a forgery. This finding was based on samples of defendant's handwriting, of his witness' handwriting, both made at the trial, and by a comparison of the salesman's handwriting, which filled out the note, with the handwritten signature. The comparison of the note with the samples was valid. Ill. Rev. Stat., 1955, Chap. 51, sec. 50; First Galesburg Bank & Trust Co. v. Federal Reserve Bank, 295 Ill. App. 524, 537. We think the court's finding was based on a fair appraisal of the oral and written testimony. It is not against the manifest weight of the evidence.

Several points are argued by defendant on the assumption that the note was not signed by defendant. In view of our approval of the court's finding that he did sign, those points need no discussion.

The note was prima facie "for a valuable consideration, and every person whose signature appears thereon" became a holder "for value," Ill. Rev. Stat., 1955, chap. 98, sec. 44. The burden of proving want of consideration was therefore on defendant, American National Bank v. Woolard, 342 Ill. 148.

In his brief defendant states that there was no consideration given him for the note. This was one of the defenses set forth in the complaint. Defendant does not supply arguments





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in support of the statement and does not dispute the argument that there is "not one iota of evidence" on the subject. We must conclude, therefore, that if that proof were an effective defense, it was not made.

For the reasons given we are of the opinion that the judgment should be, and it is hereby, affirmed.

AFFIRMED.

LEWE, P.J. AND MURPHY, J. CONCUR.

ABSTRACT ONLY.



445

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47465

NORMLYN, INC.,

Appellee,

v.

JAMES MANLEY,

Appellant.

APPEAL FROM THE

MUNICIPAL COURT

OF CHICAGO.

19 I.A.<sup>2d</sup> 482<sup>2</sup>

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for possession in a non-jury forcible detainer action.

The premises were leased to defendant for a cocktail lounge for a period of five years, commencing April 1, 1956. A rider to the lease added a number of paragraphs, including No. 25, which provides that the lessee "shall not be absent from the demised premises for more than thirty (30) days in any year commencing April 1 during the term of this lease." It was admitted at the trial that in 1957 defendant was absent from the premises a total of sixty-seven days, including a forty-five day trip to Europe.

Defendant sought to prove that prior to execution of the lease, he and plaintiff's agent orally agreed that if he increased the dram shop insurance, he could disregard the restrictive provisions of paragraph 25. He testified that he refused three times to sign the lease and further said: "I read it before I signed it. I had previously refused to sign it on other occasions but, nevertheless, I did sign it. I signed it contending that it did not correctly state my agreement with Mrs. Stone. I never



-2-

asked Mrs. Stone to write a new lease. I asked Mrs. Stone to strike paragraph 25 in my copy of the lease at the time of the signing of the lease. I asked her physically to strike it." All of this occurred before its execution.

The court sustained a motion to strike this testimony, finding that it was inadmissible because of the Parol Evidence Rule. Defendant contends this was reversible error.

The Parol Evidence Rule, generally stated, is that parol or extrinsic evidence is inadmissible to vary, alter or contradict a written instrument, where the instrument is complete on its face, unambiguous, valid, and there is no fraud or mistake in respect to the instrument. (Walter v. Schio Petroleum Co., 402 Ill. 33 (1948).) As a rule, a written lease, clear and unambiguous in its terms, cannot be varied or contradicted, by parol or extrinsic evidence of the intention of the parties, of their prior conversations and negotiations, or of prior or contemporaneous parol agreements that are inconsistent with the writing. Hoefeld v. Ozello, 290 Ill. 147, 154 (1919); Shenk v. Continental Illinois Nat. Bk. & Tr. Co., 334 Ill. App. 373, 380 (1948); 18 I.L.P., Evidence, §§251, 257.

Defendant also contends that parol evidence should have been received to explain a latent ambiguity in paragraph 25. We do not believe the authorities cited are in point. The court did not believe that paragraph 25 was ambiguous, and we agree. It was because of the language of this paragraph that defendant



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refused three times to sign the lease--also, he urged its removal, but signed the lease, fully aware of the presence of paragraph 25 and its portent.

We believe the court's ruling was correct, and that it properly rejected defendant's testimony of a prior oral understanding, because it was a violation of the Parol Evidence Rule.

The judgment is affirmed.

AFFIRMED.

LEWE, P.J., AND KILEY, J., CONCUR.

ABSTRACT ONLY.





457 A

NO. 11185

(Publish Abstract Only)

PAUL V. 11185  
AGENDA 4

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT,  
FIRST DIVISION  
OCTOBER TERM, A. D. 1958

BERNICE KAPTAIN,

Plaintiff-Appellant

vs.

OLLIE OVERGAARD and LEYDEN MOTOR COACH  
COMPANY, a corporation,

Defendants-Appellees.

19 T.A. 21 483

Appeal from the

Circuit Court of  
DuPage County.

McNEAL, J. -

Plaintiff Bernice Kaptain brought this action to recover damages for personal injuries arising out of an accident which occurred in Villa Park at about 5:00 P. M., November 9, 1954, when she was riding as a passenger on a bus operated by Leyden Motor Coach Company. The bus was traveling in a southerly direction on Villa Avenue. At the Highland Avenue intersection the driver stopped the bus for the purpose of discharging passengers. The defendant, Ollie Overgaard, who was also driving a motor vehicle in a southerly direction on Villa Avenue, stopped a few feet behind the bus. After the passengers stepped off the bus, both the bus and Overgaard started up again, and, while there is some dispute in the record on the point, all of the occurrence witnesses with one exception testified that the driver of the bus made an abrupt second stop in response to the bell or in response to a passenger's request to get off the bus. Immediately upon making this second stop, the bus was struck in the rear by Overgaard's vehicle. The plaintiff, who was seated on the right-hand side of the bus next to the window, was thrown from her seat, caught herself on the seat in front of her, and then fell back into her own seat.

Plaintiff testified that following the accident she had headaches

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and pain in her back and right leg. She was hospitalized for six days and was placed in a cast which she wore until January 14, 1938. Since then she has worn either a removable cast or a surgical support. The only bills offered into evidence were some drug bills amounting to approximately \$50, and a physician testified that a reasonable charge for the services rendered plaintiff would be \$378. Plaintiff was earning approximately \$50 per week at the time of the accident. She did not return to work until January 14, and thereafter worked part time.

The bulk of the record in this case deals with the nature and extent of plaintiff's injuries. Plaintiff testified that she advised the bus driver that she had been injured, but the driver testified that he received no complaint from anyone. Several physicians testified on behalf of plaintiff that the X-rays indicated that plaintiff had sprained her back, but a physician testified on behalf of the defendants that the X-rays showed no pathology. Plaintiff testified that she had been in only one previous accident in 1932 wherein she struck the windshield of a car in which she was riding and apparently injured her face and the upper portion of her back. However, on cross-examination it was developed that she had been in several previous accidents. She was also examined at some length concerning an incident in a divorce suit wherein there was testimony that her husband had dragged her down some steps.

On the basis of the foregoing evidence the jury found Overgaard not guilty and found the bus company guilty and awarded plaintiff damages in the amount of \$1000. Plaintiff has appealed and claims that the verdict in favor of Overgaard was contrary to the manifest weight of the evidence. She further claims, with respect to Leyden Motor Coach Company, that the trial judge erred in his rulings on the evidence and the instructions, and that the verdict is inadequate.

With respect to the defendant Overgaard, the weight of the evidence indicates that he stopped behind the bus, that the bus and he started up slowly and that he struck the rear of the bus when it made a second abrupt and unexpected stop. In view of this evidence we feel that the



jury was justified in finding that Overgaard was not guilty of any negligence which caused plaintiff's alleged injuries. In *Giiggas v. Clauson*, 5 Ill. App. 2d 412, 419, and *Borst v. Langsdale*, 8 Ill. App. 2d 88, 93, we said that a verdict would not be reversed as being contrary to the manifest weight of the evidence unless "an opposite conclusion be clearly evident". In this case we do not feel that the verdict was manifestly contrary to the weight of the evidence.

With respect to the examination of the witnesses, the most serious complaint is with reference to cross-examination of plaintiff by counsel for the Leyden Motor Coach Company concerning a previous automobile accident in which plaintiff apparently injured the upper portion of her back and also concerning an incident leading to plaintiff's divorce wherein her former husband dragged her down some steps. There appears to be no question but that these incidents did occur. Plaintiff did not deny them, and the general rule is that it is permissible to cross-examine the plaintiff as to injuries received in a prior accident. (See 120 ALR 520). We agree that the trial court allowed counsel for the defense considerable latitude in his cross-examination of plaintiff, but the scope of the cross-examination rests largely within the sound discretion of the trial judge and we would not be justified in interfering with his rulings unless we find that there has been an abuse of that discretion. *McCray v. Ill. Cent. R. Co.*, 12 Ill. App. 2d 425, 437, *Mayer v. Williams*, 15 Ill. App. 2d 513, 517. We are unable to say that the record reveals a clear abuse of discretion by the trial judge.

Next, counsel for appellant object to four of the instructions given on behalf of Leyden Motor Coach Co. The first instruction objected to relates merely to credibility and was equally applicable to all parties. The second refers to proximate cause; the third (Leyden's Instruction No. 12) relates to the duty of a carrier to use the highest degree of care; and the fourth pertains in part to plaintiff's duty to exercise ordinary care. While it is true that Instruction No. 12 is grammatically incorrect, yet the jurors found the Leyden Motor Coach Co. liable in this case and

THE UNITED STATES OF AMERICA

DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

WASHINGTON, D. C. 20250

TO: THE SECRETARY OF THE INTERIOR

FROM: THE DIRECTOR, BUREAU OF LAND MANAGEMENT

SUBJECT: [Illegible]

DATE: [Illegible]

RE: [Illegible]

1. [Illegible]

2. [Illegible]

3. [Illegible]

4. [Illegible]

5. [Illegible]

6. [Illegible]

7. [Illegible]

8. [Illegible]

9. [Illegible]

10. [Illegible]

11. [Illegible]

12. [Illegible]

13. [Illegible]

14. [Illegible]

15. [Illegible]

16. [Illegible]

17. [Illegible]

18. [Illegible]

19. [Illegible]

20. [Illegible]

any conceivable error in the instructions relating to the question of liability would constitute harmless error. *Carper v. Myers*, 202 Ill. App. 485. The modern tendency favors a liberal application of the harmless error doctrine to instructions when it appears that the rights of the complaining party have in no way been prejudiced. *Huntton v. Ill. Cent. R. Co.*, 15 Ill. App. 2d 211, 329.

The final contention is that the verdict was inadequate. However, the nature and extent of plaintiff's injuries were in dispute. Several physicians who testified on behalf of plaintiff claimed that the X-rays showed that plaintiff had incurred a sprained back, whereas a physician who testified on behalf of the defense claimed that the X-rays showed no pathology. The jurors and the trial judge had the opportunity to observe the various witnesses as they gave their sworn testimony and they were in a far better position than we are to determine the weight and credence to be given the testimony. While it is true that plaintiff's expenses and loss of earnings approach the amount of the verdict, yet it is also true that there was a sharp dispute in the evidence as to whether she was injured and, if injured, the nature and extent of her injuries. It may well be that the jurors concluded that an attempt was being made to exaggerate the extent of plaintiff's injuries. Inasmuch as the question of damages has always been regarded as being particularly within the province of the jury, we are not disposed to interfere with their conclusion in this case. *McSee v. Chicago Motor Coach Co.*, 342 Ill. App. 238; *Ford v. Friel*, 330 Ill. App. 135. The latter case, as do most of those cited, deals with the question of whether the damages were excessive, but we feel that the same rule should be used in determining whether the damages are inadequate. In the *Friel* case the Court said at page 140: "The question of damages is peculiarly one of fact for the jury, and where the jury has been correctly instructed upon the measure of damage, and it is not claimed nor shown that the

the Commission has been established to investigate the  
circumstances of the case and to report to the  
President. The Commission is composed of  
members of the Executive Branch and  
independent members. The Commission  
will hold public hearings and receive  
evidence from witnesses. The Commission  
will also conduct its own investigation  
and make recommendations to the President.  
The Commission is expected to report to the President  
within a few weeks. The President will then  
decide whether to take any action.  
The Commission is expected to be a fair and  
impartial body. It will be responsible for  
conducting a thorough investigation of the case  
and for making recommendations to the President.  
The Commission will also be responsible for  
conducting public hearings and receiving evidence  
from witnesses. The Commission will also  
conduct its own investigation and make  
recommendations to the President. The  
Commission is expected to report to the President  
within a few weeks. The President will then  
decide whether to take any action.



size of the verdict clearly indicates it was the result of prejudice or passion on the part of the jury, the award should not be disturbed upon review. Lanyon v. Languist & Illisley Co., 157 Ill. App. 310 (certiorari denied by the Supreme Court); Princell v. Pickwick Greyhound Lines, Inc., 262 Ill. App. 298.

For the foregoing reasons we conclude that the judgment of the Circuit Court of DuPage County was correct and should be affirmed.

Affirmed.

SPIVEY, P. J., and DOVE, J., concur.

SPIVEY, P. J., and DAVE, J. J., compare.

47482

PAUL R. SIMON,

Appellant,

v.

ESTATE OF LOTHAR V. KNY, Deceased,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

454  
A  
19 I.A. 509

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment, after a trial de novo, allowing \$150.00 upon a claim which had been allowed in the Probate Court for \$5,322.00 against appellee's estate.

The order of the Circuit Court states that evidence was heard but there is no report of the proceedings in the record before us.

Without any report of the proceedings below there is nothing before this court which can be reviewed, Lukas v. Lukas, 381 Ill. 429. "It is elementary that where a party desires to have a judgment reviewed it is incumbent upon him to present in the record the proceedings and judgment sufficient to show the errors complained of," Knecht v. Sincos, 376 Ill. 586. See also Owens v. Prudential Insurance Co., 297 Ill. 465, and Early v. Early, 13 Ill. App.2d 394. Where the record shows there was evidence heard and there is no transcript of the testimony provided in the record on appeal we must presume that the testimony was sufficient for the judgment, Shoup v. Alexander Motor Garage Inc., 333 Ill. App. 46.

The judgment is affirmed.

AFFIRMED.

LEWE, P.J. AND MURPHY, J., CONCUR.  
ABSTRACT ONLY.



453  
17

47427

LEO FICK, SR.,

Appellee,

v.

CITY OF CHICAGO, a Municipal Corporation,  
and GEORGE L. RAMSEY, Commissioner of  
Buildings of the City of Chicago,  
Illinois,

Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

19 I.A.<sup>24</sup> 510

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

The City of Chicago, defendant, appeals from a declaratory judgment order, which finds and decrees (1) that plaintiff is not in violation of City zoning ordinances, and (2) restraining the City from prosecuting plaintiff under the ordinance. The cause was referred to a master, and his report, findings and recommendations were approved by the court. Appellee has filed no brief.

Plaintiff owns the subject property. It is a brick dwelling in Chicago and located in a neighborhood and general area almost exclusively devoted to single family residential use. He purchased it in 1924. It had living quarters on the first floor and an unfinished attic, to which access was had by a stairway leading from the kitchen. He and his family resided in it for a number of years.

In 1952 the City issued a permit to remodel the attic by "making sleeping rooms and bath \* \* \* for single family use only." When the remodeling was completed, the attic or second

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-2-

floor space contained a living room, three bedrooms, one bath and a kitchen with stove and sink. This apartment has one entrance, reached by a new rear enclosed stairway, leading from a ground level outside door in the rear of the building to a second floor landing. There is a first floor doorway, which separates the first apartment rear bedroom and living room from the new rear stairway. Until 1956 this doorway contained a door, with keys held only by those persons living on the first floor. After the litigation commenced, this door was removed and was replaced by a curtain.

Plaintiff, his daughter, her husband and child, all moved (from another address) into the second floor apartment. His married son and family continued to occupy the first floor, which they had been doing for some time prior thereto.

Both families have keys to the ground level outside door, which gives access to the rear stairway, but only the people on the second floor have keys to that apartment. The families eat separately and pay their own food bills. There are two electric meters, two telephones and two mail boxes, and each family pays its own electric and telephone bills. There is one doorbell located on the front door, connected with the first floor apartment. There are two doorbells located on the rear ground level door, one for the first floor and the other for the second.

In May, 1955, plaintiff was notified by the City to discontinue the use of the apartment in the attic as a separate housekeeping unit and restore the building to its original





-3-

construction, on the ground that this use was in violation of Section 194a-5 of the Chicago Zoning ordinance. In August, 1955, a quasi-criminal complaint against him was filed in the Municipal Court.

Plaintiff then filed the instant proceedings, seeking a declaratory judgment that his use of the premises is lawful and restraining the City from prosecuting him for that use.

Section 2 of the Zoning Ordinance defines "family residence" as "A building entirely separated from any other building by space, designed, arranged, used or intended to be used as one apartment," and defines "apartment" as "A room or suite of rooms, arranged, designed, used or intended to be used as a single house-keeping unit." Section 5 states that a permitted use in a family residence district is: "Family residence for use by persons related to one another \* \* \*."

The judgment order approved the master's report and found that plaintiff failed to prove that his property is actually being used as one apartment, but also found, it "is arranged, designed and intended to be used as one apartment," so that plaintiff is not violating said ordinances. The court permanently enjoined and restrained the City from proceeding and continuing with the prosecution of the suit filed against plaintiff in the Municipal Court of Chicago, and from taking any action or instituting any other proceeding whatsoever to prosecute plaintiff for using his aforesaid property as a family residence for himself and the members of his family. The court taxed all costs of the proceedings against the City.



The master stated in his report that, in his opinion, City of Chicago v. Kurowski, 4 Ill. App.2d 586 (First District), is decisive of the case at bar and required the conclusions reached. The facts in that case are quite similar but, we believe, readily distinguishable from the facts here presented. That opinion says:

"Defendant asserts without contradiction that there is no separate or private stairway to the attic and no means of access thereto except through the living quarters on the first floor. \* \* \* Our views are limited to the case at bar and should not be considered as a precedent in the construction of the Zoning Ordinance."

In the instant case, there is a full, separate and private stairway, with access to the second floor apartment without entering or passing through any part of the first floor apartment.

The master found, and we agree, that the property is not actually being used as one single apartment or housekeeping unit. We do not agree with his conclusion that the premises are designed and arranged for use as one apartment. The second floor contains a complete apartment--living room, sleeping rooms, bath and full kitchen, with single access thereto by a stairway which leads from a ground level outside door direct to the second floor apartment, without entering any part of the living quarters on the first floor.

We believe this remodeling and alteration of an existing building was intended to avoid and violate the definitions, restrictions and limitations of Sections 2 and 5 of the Chicago Zoning Ordinance, and the city officials were correct in their efforts to prevent a continued use which was incompatible with the character of a family residence district.



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We hold the remodeling of this building, and second floor, was designed, arranged and intended to make two separate apartments, and that the premises are now used and intended to be used as two separate single housekeeping units, and therefore, plaintiff's use of the premises is in violation of the Chicago Zoning Ordinance, even though the present occupants are all related.

The judgment order is reversed and the cause is remanded to the trial court, with directions to enter an order declaring the rights of the parties in accordance with the views expressed herein, and taxing all costs against plaintiff.

REVERSED AND REMANDED  
WITH DIRECTIONS.

LEWE, P.J., AND KILEY, J., CONCUR.

ABSTRACT ONLY.



456  
47480

M. HOWARD GREENE,

Appellee,

v.

ERWIN GOLD,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

191.A. 2d 311

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff sought to establish an attorney's lien, under the provisions of paragraph 14, chapter 13, Illinois Revised Statutes 1951, arising out of the settlement of a personal-injury and property-damage claim asserted by one Erwin Radtke, who was alleged to have retained plaintiff as his attorney. The cause was tried by the court without a jury. Various motions made by defendant challenging the sufficiency of the complaint were denied; no evidence was offered by defendant; and at the conclusion of the hearing the court entered judgment in favor of plaintiff in the sum of \$916.00, from which defendant appeals.

The verified statement of claim filed November 27, 1956, alleges in substance that plaintiff is an attorney and a partner in the law firm of Block, Greene, Karras and Kowal; that on June 26, 1956 plaintiff was orally retained by Radtke to prosecute or settle claims for damages against defendant Erwin Gold arising out of an accident which occurred at or near 50th street and Central avenue in Cook County, Illinois on June 22, 1956; that by this contract Radtke agreed to pay plaintiff as compensation a sum of





-2-

money equal to one-third of any amount realized, whether by judgment or by settlement; that in compliance with paragraph 14 of chapter 13 of the Illinois Revised Statutes 1951, plaintiff on June 26, 1956 served notice in writing, by registered mail, upon defendant, claiming a lien for services rendered, and stating therein plaintiff's interest; that in pursuance of this agreement plaintiff made a complete investigation of the accident and thereafter entered into negotiations with the defendant with a view to settlement of the claim; that subsequently, about September 1, 1956, defendant did settle and pay the sum of \$2750.00 to Radtke in full settlement, without the consent or knowledge of the plaintiff; and that by reason thereof plaintiff claims to be entitled to an amount equal to one-third of the settlement.

On January 28, 1957 defendant filed his verified defense denying that Radtke had made an oral contract with plaintiff or that he had agreed to pay as compensation for services a sum equal to one-third of any amount recovered from defendant; and he averred that on June 26, 1956 a letter was sent by plaintiff to Radtke in which he enclosed a form of contract for an attorney's lien and requested Radtke's signature thereto. In that letter Radtke was asked to sign the document and return it to the firm of Block, Greene, Karras and Kowal, but he failed or refused to do so. Defendant further averred that plaintiff at no time had any individual interest in any claim that Radtke might have had against defendant, and that the claim for attorney's lien was that of the law firm and not of Greene as an individual.



-3-

The letter of June 26, 1956, addressed jointly to Charles Gold (the owner of the car) and Erwin Gold (who was driving the car at the time of the accident), bears the signature of Block, Greene, Karras and Kowal by Howard Greene. It advises the Golds that "this office has been retained by Mr. Erwin Radtke who was injured in an automobile accident on June 22, 1956 at or near Central and 51st St. which was due to the negligent operation of your [the Gold] motor vehicle," and continues: "Enclosed please find Notice of Attorney's Lien which you will kindly forward to your insurance company. Upon receipt of an acknowledgment from them, we will trouble you no further in this matter." The enclosed contract for an attorney's lien recites that Radtke had placed "in our hands as his attorneys for suit or collection" a claim "against you growing out of an automobile accident" and that Radtke had agreed to pay as compensation for services rendered "a sum equal to ..... [omitting any fractional formula] of whatever amount that may be recovered from said claim by suit, settlement or otherwise," and that a lien is claimed for attorney's fees.

Neither the letter nor the enclosure of the agreement which Greene's law firm sought to have Radtke sign was attached to plaintiff's complaint. However, defendant attached both these documents to his verified defense as a basis for his contention that by failing to attach a copy of the contract for a lien to his complaint plaintiff failed to comply with the Civil Practice Act and the rules of the Municipal Court. There is conflicting evidence



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as to whether the attorney's lien notice produced by the defendant was the one which accompanied the letter of June 26th or whether it was one sent subsequently to the attorney for the Golds and differed in that the original had the blank properly filled in; but in view of our opinion of the procedure it is not necessary for us to pass upon that matter.

Before any evidence was adduced upon the hearing defendant moved for judgment upon the pleadings on the ground that plaintiff, by failing to reply to the affirmative allegations of the answer, thereby admitted them; and that those affirmative allegations were sufficient to compel the court to enter judgment in favor of defendant. There followed the testimony of Howard Greene, Erwin Radtke and Marilyn Graham, Greene's secretary. The burden of Greene's testimony was that he was acting for the law partnership; he did not claim that he individually was entitled to a lien. All the exhibits and the testimony indicate that it was the law firm, not Greene individually, that should have asserted the claim; but in fact Greene was the sole plaintiff in the case, and the judgment was entered in his favor.

The record is not clear as to whether defendant Erwin Gold ever received notice of the lien. It was initially mailed to the wrong address and returned two weeks later. Subsequently Greene found the correct address in the telephone directory, telephoned defendant's home and talked to a woman who advised Greene that Erwin was the son of Charles Gold and that it was Charles Gold's automobile that was involved in the accident.



-5-

Greene thereupon mailed the same carbon copy of the lien to Charles Gold at the corrected address. In later telephone conversations with Greene, Charles Gold stated that he was covered by liability insurance and that the claim would be settled.

After the events heretofore related had taken place, the law firm of Block, Greene, Karras and Kowal on August 1, 1956 mailed a bill to Erwin Radtke at his home in Willow Springs, Illinois in the amount of \$250.00 for legal services rendered in the accident involving Radtke and Gold, with the request that check for that amount be forwarded to the law firm, whereupon it would forward a release of attorney's lien by return mail. When the court asked Greene why he had agreed to accept \$250.00 after asserting a claim of \$916.00 he replied that he had some other matters pending with the State Farm Insurance Company, the carrier, and that its representative, Mr. Lindenberg, had said in effect that inasmuch as this was a small claim the carrier wanted the matter disposed of by settlement; and that in order to comply with the request he sent the bill.

Since, in the view we take, further proceedings may be instituted by the law firm to enforce the lien, we refrain from making additional comments as to the merits of the case. The pleadings clearly indicate that this claim for a lien was asserted by Howard Greene, not by the law firm of which he was a partner; that he instituted suit in his own name; and that the judgment was entered in his favor. Since the evidence is all to the





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effect that the claim, if any, was that of the law firm, we think it was error for the court to enter judgment in favor of Greene individually.

Greene evidently realized this circumstance because on oral argument here he sought, by oral motion, to have the law firm substituted as party plaintiff, and the judgment entered in its favor. After a case has been tried and judgment entered, a court of appeal has no power to substitute one party plaintiff for another and modify the judgment accordingly. The amendment now sought should have been made in the course of trial and before judgment. We are therefore constrained to hold that the judgment must be reversed, without prejudice, however, to the right of the partnership of Block, Greene, Karras and Kowal to institute new proceedings to assert any claim it may have for an attorney's lien against defendant.

JUDGMENT REVERSED.

BRYANT and BURKE, JJ., CONCUR.

ABSTRACT ONLY.



455  
47483

BETTY SANDERS, Administratrix of the  
Estate of ARTHUR BERGSTROM, Deceased,

Appellant,

v.

BALTIMORE AND OHIO CHICAGO TERMINAL  
RAILROAD CO., BALTIMORE AND OHIO  
CONNECTING RAILROAD CO., BALTIMORE AND  
OHIO AND CHICAGO RAILROAD CO., THE  
BALTIMORE AND OHIO RAILROAD CO., and  
THE BALTIMORE AND OHIO SOUTHWESTERN  
RAILROAD CO.,

Appellees.

A  
APPEAL FROM

SUPERIOR COURT

COOK COUNTY

19 I.A.<sup>2d</sup> 5127

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered following a directed verdict finding the defendant not guilty. The cause of action is for wrongful death and relates to the death by drowning of one Arthur Bergstrom on June 20, 1951.

Plaintiff is the administratrix of Arthur Bergstrom's estate. The decedent, a boy of about eleven years of age and in the sixth grade of school, met his death by drowning in a well formed by a caisson of a bridge or railroad trestle which spans the sanitary canal near 31st Street and about one and one-half blocks west of Western Avenue in the City of Chicago, County of Cook, State of Illinois. The suit is predicated upon the theory of attractive nuisance.

The complaint alleges that "defendants, or some of them, were possessed of, used, controlled and operated a certain railroad trestle or bridge," at the location set forth above, and that



-2-

certain "cement walls, ramps, and other structures," which were used as appurtenances to the bridge were located "so closely to the said body of water," that they "constituted an attractive but dangerous place for children to come upon and engage in recreational activities." It then charges defendants with knowledge that it was the custom and practice of children to play and swim there, and that the death of Arthur Bergstrom occurred while he was ascending one of the cement walls used as an appurtenance to the bridge or trestle. It also charges that defendants negligently managed, possessed, used, and controlled said trestle or bridge, cement walls, ramps, and other structures, and as a direct and proximate result the death of Arthur Bergstrom took place.

The answer of defendants admitted that on June 20, 1951, they, or some of them, were possessed of, used, controlled, and operated a certain railroad trestle or bridge located as above set forth. It denied that it was an attractive nuisance for children and denied all of the other allegations of the complaint.

The complaint named the following as defendants: Baltimore and Ohio Chicago Terminal Railroad Co., Baltimore and Ohio Connecting Railroad Co., Baltimore and Ohio and Chicago Railroad Co., The Baltimore and Ohio Railroad Co., and The Baltimore and Ohio Southwestern Railroad Co. At the close of the evidence all of the defendants except the Baltimore and Ohio Chicago Terminal Railroad Co. were dismissed, and no point is made on this appeal of their dismissal.



Plaintiff's testimony proved that the death of Arthur Bergstrom took place in caisson number 3, numbering from the east, there being four caissons. Plaintiff introduced what other evidence it thought necessary in regard to the question of whether the bridge was an attractive nuisance. Then plaintiff rested.

Defendant, maintaining the issues on its part, introduced over the objection of plaintiff's counsel evidence that the structure at 31st Street and Western Avenue crossing the drainage canal was in fact four separate bridges, each maintained and operated separately and each having a separate caisson underneath it, that the first bridge to the east, under which well number 1 is located, is owned by the Chicago River and Indiana Railroad, a subsidiary of the New York Central, that the second bridge from the east, under which well number 2 is located, is owned by defendant Baltimore and Ohio Chicago Terminal Railroad, and that bridges number three and four, numbering from the east, are both owned by the Pennsylvania Railroad, and under them wells number 3 and 4 respectively are located. Defendant then rested. The only rebuttal offered by plaintiff was the reading to the jury of paragraph 1 of the complaint and paragraph 1 of the answer. Thereupon defendant made a motion for a directed verdict, which was allowed. The verdict was signed and returned and judgment entered thereon. It is from that action that this appeal is taken.

It is clear that the court below thought that there was a fatal variance between the allegations and the proof, and that defendant had not been proved guilty of negligence or in





any way connected with or responsible for the death of Arthur Bergstrom, in that it was proved that the death of Arthur Bergstrom occurred upon a bridge possessed of, used, controlled, and operated by some corporation other than defendant. It appears to us that that variance is entirely clear. Plaintiff's own testimony showed that the death of Arthur Bergstrom took place in the third well from the east, and defendant's testimony is uncontroverted that it was possessed of, used, controlled, and operated the bridge connected with the second well from the east.

Plaintiff has urged that the pleadings of defendant were evasive, and that an affirmative defense was proved which had not been specially pleaded, relying on the provisions of sections 40 and 43 of the Civil Practice Act. It is the opinion of the court that there was no defect in the pleadings here, but that the defect was in the proof, in that plaintiff had alleged the wrongful death of decedent on the premises possessed of, used, controlled, and operated by this defendant, and that proof was not offered. Defendant had alleged that it was possessed of, used, controlled, and operated a certain bridge, and it was entitled to prove exactly what bridge it owned. When it did so, the deficiencies in plaintiff's proof became evident.

We have examined the cases cited by plaintiff-appellant. Those which appear to be at all in point turn upon the proposition that you cannot allege one matter and prove another. That proposition is not applicable in this case, where the ownership is alleged, and the proof relates only to what specific thing is owned.

The judgment of the trial court is affirmed.

AFFIRMED.

FRIEND, P. J., and BURKE, J., CONCUR.

ABSTRACT ONLY.

ABSTRACT OF  
THE PROCEEDINGS

457  
47008

BETTY DONOHO,

Appellee,

v.

O'CONNELL'S, INC., a corpora-  
tion,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

191 A. 512

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

The defendant appealed from a judgment against it for \$20,000 entered on a verdict in an action for personal injuries sustained when plaintiff fell in its restaurant on June 22, 1954. We reversed the judgment and directed that judgment notwithstanding the verdict be entered for the defendant. 13 Ill. App.2d 250, (Abst.) The Supreme Court, having granted leave to appeal, held that we erred in directing that judgment notwithstanding the verdict be entered and remanded the cause with directions to consider other issues. 13 Ill. 2d 113. The opinions adequately summarize the testimony.

The first point not previously decided, urged by the defendant, is that the verdict is contrary to the manifest weight of the evidence. It points out that plaintiff's case hinges upon proof of the existence of an onion ring on the floor, and that in contradiction to the testimony of plaintiff, six witnesses for the defendant testified that they made an examination of the immediate vicinity where plaintiff fell shortly after the occurrence while she was sitting in a chair awaiting the arrival of the police, and that all they saw on the floor



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was a scuff mark. The opinion of the Supreme Court states that the plaintiff has not only presented evidence that the foreign substance was closely related to defendant's operations "but has presented additional circumstantial evidence that the onion ring on which she slipped was located beside the stand-up table cleaned by the bus boy; that under the bus boy's practice of cleaning up the tables food particles could drop to the floor, and testimony that after the bus boy cleaned the stand-up table no one else ate there or was in that area for fifteen minutes before plaintiff fell"; that "proof of the smear on the sole of the left shoe when it was examined at the hospital is corroborative of plaintiff's claim"; and that "from this circumstantial evidence it could be reasonably inferred that it was more likely that the onion ring was on the floor through the act of defendant's servant than by the acts of any customer." In addition to the circumstantial and corroborative evidence mentioned in the Supreme Court opinion the jury had a right to consider claimed inconsistencies and conflicts in the testimony of defendant's witnesses. After a careful consideration of the testimony, the pertinent cases and the Supreme Court opinion, we cannot say that the verdict is against the manifest weight of the evidence. Defendant asserts that as there is no circumstantial evidence in the case, the court committed reversible error in giving an instruction on that subject. We have indicated that the Supreme Court's opinion points out items of circumstantial evidence which should be taken into consideration in evaluating the case. Therefore an



-3-

instruction on circumstantial evidence was proper.

Defendant maintains that the court erred in giving the following instruction:

"In passing upon the testimony of all the witnesses who have testified in this case, you have the right to take into consideration any interest which said witnesses may feel growing out of their relation to either of the parties to this suit, as employees or otherwise, if any such is shown, and give to the testimony such weight only as you think it entitled to under the evidence in this case."

It says that this instruction is highly prejudicial in that it calls specifically the attention of the jury to the defendant's employees who testified in its behalf, whereas the plaintiff was the only occurrence witness who testified in her behalf. Similar instructions have been approved and criticized. While we do not approve this instruction, we do not think it prejudiced defendant.

Defendant criticizes the giving of three instructions referring to the issues in the case on the ground that the court did not give any instruction defining the issues. See Signa v. Alluri, 351 Ill. App. 11. Two instructions given at the request of the defendant define the issues and complement the instructions tendered by the plaintiff.

Defendant asserts that the court erred in refusing to instruct the jury that "if you believe from the evidence, under the instructions of the court, that the injury to the plaintiff was the result of a mere accident which occurred without any negligence on the part of the defendant, you should return a verdict in favor of the defendant." Defendant says that this instruction should have been given on its theory that the plaintiff





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did not slip on an onion ring "but merely slipped and fell as people are prone to do." The jury was instructed on the issues. We are convinced that the giving of this instruction would not aid the jury in resolving the issues. The trial judge was right in refusing to give it. Finally, the defendant insists that the court erred in refusing to give the following instruction:

"If you believe from the evidence that the plaintiff by using her faculties with ordinary and reasonable care as herein defined in looking out for danger, would have avoided her alleged injuries on the occasion in question and that she negligently failed to do so and thereby contributed to the accident, then the plaintiff cannot recover."

The trial judge fully instructed the jury on the subject of contributory negligence. The court did not err in refusing to give this instruction.

For the reasons stated the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

FRIEND, P. J., and BRYANT, J., CONCUR.

ABSTRACT ONLY.



462

A

47418

ADOLPH RUETER,

Appellant,

v.

VILLAGE OF FLOSSMOOR, ZONING  
BOARD OF APPEALS FOR THE  
VILLAGE OF FLOSSMOOR, and  
CHESTER NELSON,

Appellees.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

19 I.A. 572

MR. PRESIDING JUSTICE McCORMICK DELIVERED  
THE OPINION OF THE COURT.

This appeal is taken from an order of the Circuit Court of Cook County dismissing the complaint of the plaintiff because it fails to show that the plaintiff has the necessary interest to maintain the suit.

The plaintiff filed a complaint, the basic allegations of which were that he owned certain described property located in the Village of Flossmoor consisting of a lot improved with a six-room bilevel home and a swimming pool, built in 1941; that the defendant Nelson owned certain described real estate located in the same village, which property was annexed to the Village of Flossmoor by an ordinance dated December 2, 1948, and on July 18, 1949 by an ordinance the property was zoned as AA Residential, which ordinance allowed a variance to continue the nursery business operated by said Nelson, and gave permission to Nelson to improve the property with a greenhouse for use in the nursery business only. The further allegations of the complaint concerning the alleged wrongs suffered by the plaintiff are set out and discussed later in the opinion.

The complaint was in four counts. To this complaint



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defendant Nelson filed an answer. The Village of Flossmoor filed, under section 48 of the Civil Practice Act, a motion, supported by affidavit, to dismiss the suit as to the defendant designated in the complaint as "Zoning Board of Appeals for the Village of Flossmoor" on the ground that there is no such legal entity in existence and to dismiss Counts I and II of the complaint as to the village on the ground that they would require the court to enter an order reversing the findings and order of the Zoning Board of Appeals of the Village of Flossmoor involving the same subject matter and the same issues, which findings and order were entered on June 22, 1957, a copy having been served on counsel for the plaintiff, and that the plaintiff has failed to take action under certain sections of the Administrative Review Act (Ill. Rev. Stat. 1957, chap. 110, pars. 267-272).

The trial court on October 7, 1957 entered an order finding that "the plaintiff has failed to show by his complaint that he is a person entitled to maintain this suit" and ordering that the suit be dismissed. Subsequently on October 29, 1957 the plaintiff moved to vacate the order of October 7, 1957 and offered an amendment to Count III of his complaint. After hearing, the court denied the plaintiff's motion to vacate its order dismissing the complaint and to amend his complaint, from which order this appeal is taken.

It is well settled that a complaint brought by virtue of any statute or the common law must state a cause of action (Winston v. Zoning Board of Appeals, 407 Ill. 588), and this same rule applies to a suit for declaratory judgment (DeCano v.



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State, 110 P.2d 627 (Wash.)). In order to state a cause of action in a suit attacking a zoning ordinance on constitutional or other grounds, the plaintiff must show that he will be directly and specially damaged in person or property by its enforcement.

We will first consider the ruling of the trial court with reference to Counts I and II of the complaint. Those counts, in addition to the basic allegations previously stated, set out that on July 18, 1949, within six months after the annexation of the property of the defendant Nelson to the Village of Flossmoor, an ordinance was passed by the village board permitting him to continue to operate a nursery business and to improve the property with a greenhouse for use in the nursery business; that on September 19, 1949 an ordinance was passed which imposes a limitation in size and height upon any building which might be erected by the defendant Nelson on the said property and that Nelson has, after the passage of the said ordinance, constructed a "quonset type steel building of a nature completely incongruous with the general character of the residential neighborhood in which it stands." The complaint enumerates the uses permitted under the general zoning ordinance of the Village of Flossmoor in AA Residential districts. Under that ordinance the plaintiff might have maintained a nursery and sell on the premises the products grown thereon, if the sale was made only by members of his family or by families living on such premises, and he might maintain a greenhouse on his property if it was not conducted for profit. There is no allegation in the complaint with regard to a violation of either of these conditions.

Count I of the complaint alleges that the ordinance of





September 19, 1949 was passed without complying with the governing statutes. It prays that the ordinance be declared unconstitutional and void; that the village be enjoined from enforcing it; that the defendant Nelson be enjoined from occupying the said building, and that he be ordered to remove it.

Count II prays that the court by declaratory judgment find that the ordinance of September 19, 1949 is an unreasonable and illegal exercise of power on the part of the village and that it is unconstitutional; that the defendant Nelson shall not have the right to construct any building on the property which exceeds the limitations of the AA Residential district, as defined in the zoning ordinances.

Before the passage of the ordinance of September 19, 1949 Nelson could have erected on his property, under the ordinance of July 18, 1949, a building without any limitation as to height or area. The ordinance of September 19th provides for such limitation. This was a restriction imposed upon Nelson. It would be for the benefit of the plaintiff and that latter ordinance, the validity of which is attacked in the complaint, could not be said to harm the plaintiff in any way.

It is well settled that this court has no right on constitutional questions. Here at the very threshold case the trial court dismissed plaintiff's suit on the ground that he had in his complaint failed to set out facts to state a cause of action or to show that he could maintain the suit. By its order the court precluded the raising or determination of the constitutional question.



together with the other allegations set out in the complaint. We have jurisdiction to pass upon this contention, and we hold that the plaintiff has failed in Counts I and II to show any damage to his property by virtue of the ordinance of September 19, 1949, which it is alleged was an unconstitutional exercise of power by the village board. The trial court ruled properly in dismissing the suit as to Counts I and II of the complaint.

Counts III and IV of the complaint attack the validity of an ordinance passed by the village board on August 19, 1957 and ask that it be held unconstitutional, by which ordinance the defendant Nelson was granted a variance permitting him to operate a gift shop on his property as a nonconforming use, but limiting such operation to that part of the premises described on a certain plan submitted by the owner. (This building plan does not appear in the record.) The plaintiff alleges that the amendment was passed for the sole benefit of the defendant Nelson, and is confiscatory and discriminatory and was passed "for no reason related to the public good, depreciates the value of the plaintiff's property, allows increased congestion in the public streets in the vicinity of plaintiff's property, has an injurious effect on the health, safety and welfare of the public and a particularly prejudicial effect on and an undue advantage over plaintiff's property and other buildings and property in the immediate area, and disrupts and upsets values and building development in the area, all to the great damage of the plaintiff"; and that if such ordinance is permitted to be enforced the plaintiff will suffer great and irreparable loss and injury. Count III prays that the ordinance be declared unconstitutional and that the



defendant Nelson may be enjoined perpetually from operating such a gift shop. Count IV prays that the court by declaratory judgment find that the ordinance of August 19, 1957 is unconstitutional and that the defendant Nelson should have no right to operate a gift shop on the said property.

The plaintiff urges that he has a right to bring the action under section 73--9 of the Cities and Villages Act (Ill. Rev. Stat. 1957, chap. 24, par. 73--9), which authorizes any owner or tenant of real property in the same contiguous district as the building or structure in question, in addition to other remedies, to institute an appropriate action or proceeding to prevent or correct zoning violations. That section of the statute was interpreted in E. Chestnut St. Corp. v. Bd. of Appeals, 10 Ill.2d 132, in which the court says:

"The fact that the zoning statute purports to confer upon qualified owners a right to bring suit for violation does not answer the question presented here, however, which concerns the propriety of granting a variation rather than mere enforcement. We have heretofore held that the right to review a final administrative decision is limited to those parties of record in the proceeding before the administrative agency 'whose rights, privileges, or duties are affected by the decision.' (Winston v. Zoning Board of Appeals, 407 Ill. 588.) In that case a variance had been granted for construction of a 40-unit apartment building on certain property classified in a 'B' country home district of Peoria County. A complaint, filed under the Administrative Review Act by other property owners who were parties of record before the zoning board, alleged that they owned property in the vicinity of the premises involved and that the value and use of their property were affected by the granting of the variance. In affirming a judgment dismissing the complaint, this court held that to state a cause of action specific facts must be alleged showing that the plaintiffs were injured or damaged by the decision sought to be reviewed."

The rules set out with reference to appeals from proceedings to review a final administrative decision are equally applicable to



cases where proceedings are brought attacking the validity of an ordinance permitting a variance where the right to pass such an ordinance has been reserved to the corporate authorities.

In both E. Chestnut St. Corp. v. Bd. of Appeals, supra, and in 222 E. Chest. St. Corp. v. Bd. of Appeals, 14 Ill.2d 190, the court held that it was incumbent upon a party seeking such review to both allege and prove that the action taken would in fact adversely affect such party. The action suffered by the plaintiff must be different from that suffered by the public generally. Garner v. County of Du Page, 8 Ill.2d 155. In Winston v. Board of Appeals, supra, the court held that an allegation in the complaint that the value and use of the property of the plaintiff would be affected by the variance was not sufficient inasmuch as such allegations are mere conclusions and must be supported by pleading specific facts which show a special damage to the property of the plaintiff. In Counts III and IV of the complaint the plaintiff has alleged as a conclusion, unsupported by fact, that the value of the plaintiff's property would be greatly depreciated. The other allegations with reference to the damage which would result to the public generally by the maintenance of a gift shop do not support the plaintiff's right to bring a suit. In his complaint the plaintiff has not set out the character of the business conducted by the defendant, nor any facts which would indicate that there would be substantial damage done to any of the adjoining property, much less that his own holdings would suffer special damage.

The plaintiff on October 29th, at the time when he moved





to vacate the order of October 7, 1957, offered an amendment to Count III of his complaint, which amendment set up that the plaintiff's property lies immediately adjacent to that of defendant Nelson; that it is located within the same district as that of Nelson and is still classified under the village ordinance as AA Residential. (Note: In the abstract it is stated to be "A Residential," but an examination of the record indicates that the amendment set it up as "AA Residential.") The amendment also alleges that the plaintiff is not permitted to enjoy the same use of his property as that permitted Nelson, to-wit, use as a gift shop.

Whether an amendment to a complaint should be allowed is largely in the discretion of the trial court, and in the proper exercise of its discretion the court may grant or refuse leave to file the amendment in accordance with the facts disclosed in the particular case. 30 I.L.P. Pleading, sec. 104. While in the original complaint there was no allegation that the property of the plaintiff was in the same contiguous district as that of the defendant Nelson, under our view this allegation would not add anything to the complaint which would make the court's order of dismissal erroneous. Plaintiff attempts to bring himself within the rule requiring that he show special damage to his property by his allegation in his amendment that he is not permitted the same use of his property as that permitted the defendant Nelson by the variance. In Moran v. Zoning Board of Appeals, 17 Ill.App.2d 280, we said:

"It is true that in Winston v. Zoning Board of Appeals, supra, on a motion to dismiss the complaint, the court says that in order for the plaintiffs to show that they were aggrieved by the decision of the Zoning Board it would be necessary for them to allege, for example, that their property

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was classified in the same district as the land in question but that they were not permitted the use allowed by the variance. However, reading the entire opinion in the Winston case it is apparent that the contention of the plaintiffs that that one allegation standing alone was sufficient even to state a cause of action cannot be sustained."

The trial court did not abuse its discretion in refusing to vacate the order dismissing the suit and denying the plaintiff the right to file an amendment to Count III of the complaint. If the amendment had been incorporated in the complaint, it would not affect the correctness of the court's order of dismissal.

The order of the trial court dismissing the suit on the ground that the plaintiff has failed to show by his complaint that he is a person entitled to maintain this suit is a proper order. We find no error in the record, and the order is affirmed.

Order affirmed.

Robson and Schwartz, JJ., concur.

Abstract only.



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COURT OF CHICAGO.

91.A.573

91.A.579

Appellee.

91.A.579

91.A.579

On September 6, 1956 the defendant wrote the plaintiff asking him to represent it in collecting a claim for \$14,863.83 against the Polan Industries, Inc., of Huntington, West Virginia. The claim grew out of transactions between the Durabilt Mfg. Co., of Aurora, Illinois, and the Polan Industries, Inc. The Durabilt Mfg. Co. had assigned the claim for a valuable consideration to the defendant which asked the plaintiff to represent it as the creditor and owner of the claim. The plaintiff accepted and the parties agreed that the Commercial Law League of America rates and terms should apply, and on September 18, 1956 the defendant sent the claim to the plaintiff. In its letter of transmittal the defendant suggested that the plaintiff make one demand on the debtor for payment, giving the debtor a short time



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to reply, since it felt that a suit should be promptly filed in the event the claim was not paid in full during a short period. The plaintiff immediately proceeded to work on the claim. Letters were exchanged between the plaintiff and the defendant concerning the plaintiff's negotiations with the debtor Polan Industries, Inc., which was endeavoring to settle the claim by offering to make installment payments on the account. No satisfactory arrangements having been arrived at with reference to payment by the debtor, on October 18, 1956 the plaintiff wrote the defendant informing it that the debtor had suggested that it give a six-month note with interest at 6%, which it would try to reduce during the period, if it were able. In the letter the plaintiff further says: "I am sure that this proposition would not be acceptable to you, as no doubt you would expect them to make some sort of payment in the meantime, and their giving a note without endorsement or security would not at this time be much of an inducement, and it may be that a suit would bring a better offer." On November 9th, in reply to that letter, the defendant wrote that it had advised the Durabilt Mfg. Co., the original owner of the claim, that it, the defendant, intended to bring suit; that Durabilt Mfg. Co. for business reasons did not want to have suit brought against the debtor, and so it repurchased the claim from the defendant. The letter further stated that Durabilt had received no payment or note and that it wished to give the debtor further time to pay. The defendant also instructed the plaintiff to withdraw the claim from collection and pursue it no longer. On November 12th the

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plaintiff wrote the defendant demanding a fee based on the amount involved under the rates set out in the resolutions of the Commercial Law League of America, which amount was \$1,551.38. With the letter the plaintiff submitted a bill for the sum in question. On November 16th the defendant wrote plaintiff stating that the plaintiff was "probably entitled to be paid for the work done on the claim" and that it had expected to receive a bill for reasonable compensation for services rendered in accordance with resolutions 23 and 28 of the Commercial Law League of America.

The resolutions of the Commercial Law League of America, which are pertinent are:

Resolution 16. "When a claim is paid direct to a creditor, after it has arrived at the office of the receiver, and after demand for payment has been made upon the debtor, the receiver is entitled to commissions according to the recommended fee schedule. \* \* \*

Resolution 28. "When an attorney reports a claim to be uncollectible without suit and the client chooses not to sue, the attorney, at the request of the forwarder or creditor, shall return the claim without charges, excepting where the arrangement under which the claim was placed contemplated suit and the preliminary work of the attorney was done in reliance on the client's good faith in the matter, in which case the attorney is entitled to reasonable compensation for services rendered."

The plaintiff contends that the repurchase of the claim by the original debtor, the Durabilt Mfg. Co., constituted a payment to the defendant since it had dealt with the plaintiff as an actual creditor and owner of the claim by assignment, and that therefore, since the claim had been paid to the defendant, the creditor, the parties were brought within the purview of resolution 16 of the Commercial Law League of America.

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The trial court had found that the purport of the letter of October 18th was that the plaintiff had reported the claim uncollectible except by suit, and that consequently resolution 28 applied.

The defendant urges that there is nothing in the record indicating a payment either by the debtor or on its behalf and that the court's finding was proper with reference to the meaning of the letter of October 18th. It also urges that there is nothing in the record except the letters from the plaintiff to the defendant indicating that the plaintiff had pursued the collection of the claim against the debtor and that such letters are self-serving and should be disregarded.

The only evidence in the record in this case was introduced by the plaintiff. It consisted of letters and the resolutions of the Commercial Law League of America. It is the rule that where the evidence is solely documentary and where the only duty imposed upon the trial court is to interpret the contract the court of review is not bound by the conclusions of the trial court but may examine the documentary evidence and render an independent decision therefrom. 5A C.J.S. Appeal and Error, Sec. 1660; Kunkle v. Johnson, 268 Ill. 442; 447.

In the letter of October 18, 1956 the plaintiff informed the defendant of the last proposition made him by the debtor and stated that in his opinion a suit would bring a better offer. This letter was interpreted by the trial court to mean that the plaintiff had reported the claim uncollectible



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without suit, which would bring the parties under resolution 28 of the Commercial Law League of America, and the court so found. Under that resolution the plaintiff would be entitled to reasonable compensation for services actually rendered by him, and the court in accordance with that interpretation suggested that the plaintiff could make such proof. This the plaintiff refused to do. The court thereupon found for the defendant and entered judgment accordingly. In the series of letters exchanged between the parties different offers made by the debtor were stated and considered. In previous letters somewhat similar language to that of the letter of October 18th was used. This language was not considered by the defendant as a statement that the claim could not be collected without suit and throughout the correspondence there always was the threat of suit which the plaintiff was using in his endeavor to obtain a settlement. The defendant did not reject the offer contained in the plaintiff's letter of October 18th, and until it did so that letter could not properly be construed as an out-and-out determination on the part of the plaintiff that the debt could not be collected without bringing suit, and we hold that the trial court erred in so interpreting the language used in that letter.

The plaintiff then contends that he should receive full compensation as provided in the resolutions of the Commercial Law League of America. Resolution 16 provides that when a claim is paid directly to a creditor after the receiver has received it and made a demand on the debtor he, the receiver, is entitled to commissions as provided for in the schedule set out in the

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resolutions. In this case the defendant was not acting as a forwarder of the claim. In its letters it asserted that it had become the owner of the claim by assignment for a valuable consideration and that at the time when it sent the claim to the plaintiff it was the creditor of the Polan Industries, Inc. It is asserted that the reason underlying the rules of the Commercial Law League of America is that in many instances attorneys might spend a great deal of time fruitlessly and without compensation in attempting to collect a claim; in other cases the claim might be collected very easily and the attorney under the resolutions would then be entitled to the full commissions as scheduled. Thus attorneys who take claims under the resolutions upon a contingent basis would in the course of time receive a reasonable compensation for the time and effort expended upon the volume of claims sent them. In other words, it would be an evening up of the compensation when a number of claims were handled by the attorney. It is also asserted that the purpose underlying resolution 16 was that the debtor, after the attorney had expended time and effort in attempting to collect a claim, might make a payment directly to the creditor, in which case the plaintiff might have difficulty in proving either that the payment was actually made or that it was made because of the efforts put forth by the attorney. Resolution 16 prevents such a situation from arising. There is nothing in the resolutions which would prevent either the original creditor or the forwarder from withdrawing his claim from the attorney at any time up to the time of payment without falling under





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resolution 16.

In this case we have held that the defendant was not entitled to withdraw the claim under the provisions of resolution 28. The claim was resold to the Durabilt Mfg. Co., and, while the record is silent, it must be presumed that a satisfactory compensation was paid therefor. If the purpose, and it is apparent that it was, of resolution 16 was to obviate the necessity of proof of his activity on the part of the attorney, it is evident that the same reason would apply equally where the claim, after effort had been expended in an attempted collection by the attorney, was assigned to a third party for a consideration before withdrawal from collection.

In its brief the defendant agrees that at the time when it withdrew the claim from the plaintiff by its letter of November 9, 1956, since it no longer owned the claim, it had no right to make such withdrawal, but it argues that the Durabilt Mfg. Co., the then owner of the claim, had the right to withdraw the claim from the plaintiff. That fact is immaterial because the question is as to whether or not the defendant, after it had received payment, was relieved from its liability to plaintiff under the terms and conditions set out in the resolutions of the Commercial Law League of America. There is no provision in resolution 16 making it applicable only when payment is made to the creditor by the original debtor. All that is required is that the creditor be paid. If the amount paid the creditor by the third party was less than the amount of the claim, the



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burden of so proving would rest upon the defendant. (No such proof was offered. We hold that under resolution 16 the plaintiff on November 9, 1956 had no right to withdraw the claim from the plaintiff without becoming liable for the commissions set out in the resolutions. The fact that the Durabilt Mfg. Co., after the claim was assigned to it, had the right to withdraw the claim does not change the situation.

The defendant also argues that there is no showing in the record that the provision of resolution 16 was complied with by showing that a demand had been made upon the debtor, and it argues that the plaintiff's statements in his letters to that effect are hearsay and should be disregarded. However these letters were admitted in evidence without objection and with the consent of the defendant, and the letters in reply, written by the defendant, clearly indicate that it understood and accepted the letters as being true. Under these circumstances the letters may properly be considered as proof that a demand had been made upon the debtor.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded with directions that the court enter judgment in favor of the plaintiff and against defendant for \$1,551.38 together with interest.

Reversed and remanded with  
directions.

Robson and Schwartz, JJ., concur.

Abstract only.



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47415

A. A. STORE FIXTURE MART CO.,  
INC.,

Appellee,

v.

SEAY & THOMAS, INC.;

Appellant.

APPEAL FROM SUPERIOR  
COURT, COOK COUNTY.

19 I.A. <sup>21</sup> 574

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment based on an action to recover damages for the breach of an oral contract for the manufacture and delivery of certain restaurant fixtures. The cause was heard without a jury. Defendant contends that plaintiff's complaint did not state a cause of action under the Statute of Frauds, Ill. Rev. Stat. 1957, chap. 121-1/2, sec. 4, and that the court's finding was against the manifest weight of the evidence.

As to defendant's first contention, subdivision (1) of the Statute of Frauds states the general provision that a contract to sell or a sale of any goods or choses in action of the value of \$500 or more ordinarily is not enforceable by action unless there is a compliance with one of the conditions prescribed, namely, actual receipt and acceptance by the buyer, part payment or some memorandum in writing of the contract or sale signed by the party to be charged. Subdivision (2) states in part:

"...but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply."



The first paragraph of plaintiff's amendment to amended complaint recites in part:

"That on the 5th day of January, A.D. 1956, at Chicago, Illinois, in consideration that the plaintiff would make and order for the defendant at its request and deliver to said defendant...the following goods.... The defendant promised the plaintiff to accept from said plaintiff the said merchandise, when the same should be so made, and to pay to the plaintiff the said price for the same on the delivery thereof as aforesaid."

Paragraph two of plaintiff's amendment to amended complaint states:

"That the aforesaid goods, fixtures and wares were manufactured by the plaintiff especially for the defendant, as specifically ordered by the defendant; that these goods are not suitable for sale to others in the ordinary course of the plaintiff's business, and were manufactured according to the defendant's specifications and measurements as per plan set up by the defendant and the plaintiff."

Defendant's answer denied the allegations of plaintiff's complaint and affirmatively pleaded the Statute of Frauds. We are of the opinion that the complaint adequately states a cause of action (under Subdivision (2)), which avoids the Statute of Frauds.

As to defendant's second contention that the court's finding was against the manifest weight of the evidence, the record reveals that defendant, a real estate management company, leased space in a building in Chicago, Illinois, to one Adornetto for use as a restaurant. In July or August of 1955, plaintiff, who was in the business of designing and manufacturing restaurant fixtures, discussed with Adornetto the manufacturing of certain formica top tables and submitted plans therefor. Adornetto made a \$400 down payment. Some time thereafter Adornetto's





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whereabouts and solvency came into question. In January of 1956, plaintiff's vice president, Naiditch, had a conference with Seay, president of defendant, Skrivan, attorney for defendant, and Korbus, a construction engineer for defendant. At that time plaintiff, through Naiditch, presented to defendant a contract which recited the description and prices of the items in question. Plaintiff had not as yet commenced the manufacture of any equipment on Adornetto's orders because it was waiting for the balance of the down payment. There is a conflict in the testimony as to whether the ensuing conversation resulted in a contract between plaintiff and defendant for the manufacture and purchase of the items originally destined for Adornetto. Naiditch testified that Seay agreed to become a party to the contract covering the goods purchased by Adornetto. Seay denied this. In November or December Korbus picked up certain blueprints and signed plaintiff's receipt which reads:

"Received plans and specifications for equipment ordered by Seay & Thomas - For new coffee shop at 320 N. Dearborn St. - Chicago, Illinois."

Korbus said he was, in reality, picking up the plans for Adornetto. Though the Adornetto lease did not require it, defendants then spent \$1,250 in preparation for the putting in of the goods in question. This was done at a time when their supposed tenant, Adornetto, owed three months rent and before the eventual tenant for the premises was determined. Plaintiff proceeded to have the merchandise manufactured and defendant refused to either accept it or pay the purchase price.



The law is well established that when a cause is tried without a jury the determination of the credibility of witnesses, the weight to be accorded their testimony, are matters within the province of the trial court and its determination as to questions of fact will not be disturbed unless they are against the manifest weight of the evidence. Eleopoulos v. City of Chicago, 3 Ill.2d 247, 253 (1954); McGuire v. Purcell, 7 Ill. App.2d 407, 412 (1955).

From our examination of the record, we are of the opinion that we would not be justified in holding that the trial court's findings were against the manifest weight of the evidence. The judgment of the trial court is affirmed.

Judgment affirmed.

McCormick, P. J., and Schwartz, J., concur.

Abstract only.



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SEAGRAM DISTILLERS COMPANY, a  
division of THE HOUSE OF  
SEAGRAM, INC., a Delaware  
corporation,

Appellee,

v.

GUY ARMANETTI d/b/a ARMANETTI  
LIQUORS, et al.,

Appellants.

BROWNE-VINTNERS CO., INC.,

Appellee,

v.

BEN ZIMMERMAN, et al.,

Appellants.

19 I.A.<sup>26</sup> 575

INTERLOCUTORY APPEALS  
FROM CIRCUIT COURT,  
COOK COUNTY.

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal. The two plaintiffs, Seagram Distillers, Inc. and Browne-Vintners Co., Inc., brought separate suits in the Circuit Court of Cook County against a total of nineteen defendants, all of whom are engaged in the retail liquor business in Chicago, or its immediate vicinity, seeking equitable relief under Section 2 of the Illinois Fair Trade Act. The trial court denied the motions of defendants to dismiss the complaints, as amended, and granted the motions of plaintiffs for temporary injunctions prohibiting the various defendants from advertising, offering for sale, or selling products distributed by plaintiffs at less than the prices stipulated by plaintiffs under certain contracts entered into by plaintiffs pursuant



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to the Fair Trade Act of Illinois. Defendants appealed from these orders and in this court the appeals were consolidated.

Defendants contend that the temporary injunctions should not have been granted because (1) the complaints failed to allege that defendants acquired the merchandise in controversy with knowledge that it was subject to the provisions of fair trade contracts; (2) that injunctive relief is not an appropriate remedy for violations of the Illinois Fair Trade Act, and (3) that the complaints based upon the contracts in question do not allege sufficient facts to grant the temporary injunctions.

The complaints allege that plaintiffs are engaged in the business of selling and distributing alcoholic beverages throughout the United States under certain trademarks and brand names; that plaintiffs are the sole distributors of such branded products in Illinois; that plaintiffs are parties to Fair Trade contracts with a number of retailers in Illinois; that the prices stipulated by plaintiffs in accordance with these contracts were made known generally to the trade and particularly to defendants; that notwithstanding the provisions of the contracts and the demands of plaintiffs, the defendants refused to discontinue selling or offering for sale products distributed by plaintiffs at less than the stipulated prices. The complaints conclude with allegations that the conduct of defendants has done irreparable damage to the good will of plaintiffs and contain prayers for injunctive relief, costs, and such further relief as the court may deem just.

Attached to each complaint as exhibit "A" is a copy of a contract between one of the plaintiffs and a retail liquor dealer.





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The contracts are virtually identical except for the parties and provide, in substance, that the retailer will not sell, advertise, or offer for sale in Illinois branded products distributed by the plaintiffs at a resale price which differs from that which the plaintiff may stipulate by schedule from time to time. The contracts designate plaintiffs as owners and provide that the various price schedules shall be considered a part of the contract.

The pertinent portions of the Illinois Fair Trade Act provide as follows (Ill. Rev. Stat., 1957, chap. 121-1/2, pars. 188, 189):

"No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

"(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

"(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.  
\* \* \*

"Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

The defendants, with reference to their first contention that the complaints do not allege that defendants had knowledge of the contracts between plaintiffs and other retailers at the time of purchasing products from plaintiffs for resale, argue that such an



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omission from the complaints was a fatal error, while plaintiffs urge that any unawareness on the part of defendants was a matter peculiarly within their knowledge and could at best constitute an affirmative defense. While the complaints do not allege that defendants had knowledge of plaintiffs' fair trade contracts or the prices stipulated pursuant thereto when they acquired the merchandise in question, they do allege that defendants had such knowledge at the time of making the sales. Defendants do not disclaim knowledge of plaintiffs' fair trade contracts at the time they acquired their merchandise. Lack of knowledge is an affirmative defense. James Heddon's Sons v. Callender, 29 F. Supp. 579. The defendants did not interpose such a defense. Had they purchased without knowledge they should have so stated. This they failed to do.

We must next consider defendants' second contention of whether injunctive relief is an appropriate remedy for an alleged violation of the Illinois Fair Trade Act. Although the propriety of such relief has never been directly in issue in this State, our courts have tacitly approved it heretofore. See Sunbeam Corp. v. Central Housekeeping Mart, Inc., 2 Ill. App.2d 543 (1954); Old Fort Dearborn Wine and Liquor Co. v. Old Dearborn Distributing Co., 287 Ill. App. 187 (1936); Seagram Corp. v. Old Dearborn Co., 363 Ill. 610 (1936); Triner Corporation v. McNeil, 363 Ill. 559 (1936); Triner Corporation v. Oransky, 365 Ill. 19 (1936). In Triner Corporation v. McNeil, *supra*, the court noted that the propriety of the relief was not being assailed. Nor has it been assailed in any subsequent case under the Illinois Act. The Court of Appeals



for the Seventh Circuit has given approval to the remedy. In Economy Food & Liquor Co. v. Frankfort Distillers Corp., 232 F.2d 410 (7th Cir. 1956), the court affirmed the dismissal of a retailer's complaint for a counter-injunction against a distiller on the ground that the complaint constituted an indirect attack on an injunctive order granted in favor of the distiller under the Fair Trade Act of Illinois.

The defendants rely on Calvert Distillers Co. v. Wish, 1958 CCH Trade Cases, par. 68921 (D.C., N.D. Ill., 1957), in which, under similar circumstances, injunctive relief was denied. We have scrutinized that opinion and find in it no support for the argument of the defendants. While it is true that the court denied equitable relief on the basis of plaintiff's failure to exhaust whatever legal remedy might have been available to it under the Illinois Act, the opinion rests on the court's discretion to grant or deny injunctive relief and the court's finding that the alleged damages were too speculative to satisfy the requisite jurisdictional amount. Nowhere does the opinion suggest that the Illinois Act precludes equitable relief in fair trade cases. The defendants, however, insist that injunctive relief is proper in fair trade cases only where the particular act contains specific provision for such relief. The Illinois Act contains no such provision, although the acts of Idaho, Maine, Michigan, New Hampshire, Ohio, Rhode Island, and Washington do. In this respect and others the language of the South Carolina Act is similar to that of the Illinois Act. In Miles Laboratories v. Seignious, 30 F. Supp. 549 (D.C., E.D. S.Car. 1939), the court approved the enforcement of that act by injunction as follows (p. 555);



"A statute normally creates or defines a right, it may or may not provide a remedy; but the courts are never powerless to enforce a right because of doubt as to the nature of a just remedy. The entire process of injunction in equity, and in fact the courts of chancery themselves, first grew out of the inability of courts of common law of England to grant appropriate relief in certain cases, thereby suggesting to litigants, who were possessed of a right without a remedy, to apply to the King for relief; and thereupon the King delegated to his chancellor the power to grant equitable remedies, including injunction. When any right exists, and a proper showing is made that the possessor of that right is without adequate remedy at law, he has the privilege of seeking equitable relief, and this is true regardless of whether the right has its origin in the common law, or in a statute. The power to administer injunctive relief stems back to the peculiar origin and development of the courts of chancery; it is not ordinarily a statutory grant of power to the court.

"But while no authority within the statute is necessary for the administration of such relief, yet, in this statute it so happens that the legislature has indicated that such relief is intended. It defines certain conduct as 'unfair competition' and when it used those words, it used words that have a technical meaning. It has long been recognized that injunction is a proper remedy against unfair competition."

We are in accord with the views advanced by the District Court in South Carolina and can find no merit in the argument that the Illinois Fair Trade Act may be enforced only by an action at law for damages.

Defendants' third contention is whether plaintiffs were entitled to temporary injunctions on the basis of the facts set forth in the complaints. It is well settled that a party seeking a temporary injunction need only show in his complaint that he raises a fair question as to the existence of the right he seeks to enforce and that the probability of his ultimate success is sufficient to justify a preservation of the status quo pending the final determination of that question. Schuler v. Wolf, 372 Ill. 386, 389 (1939); Nestor Johnson Mfg. Co. v. Goldblatt, 371 Ill. 570, 574 (1939); Chicago Motor Coach Co. v. Budd, 346 Ill. App. 385, 390 (1952). Do the contracts upon which plaintiffs rely present a justifiable issue under





the Fair Trade Act of Illinois with some probability of success on the part of plaintiffs?

Defendants argue that the contracts in question may not be employed to invoke the protection of the Act for three reasons: (1) that the contracts do not contain the immediate vendor-vendee relationship required by the Act; (2) that the contracts lack mutuality and consideration, and (3) that the plaintiffs are not the proper parties to enter into such contracts inasmuch as they are neither the producers nor the owners of the trade-marked products. Each of the foregoing arguments presents a legal question which has not yet been resolved in this State. We need not reach an ultimate decision of those questions at this time, but must determine only if on the basis of authority on which plaintiffs rely there is a reasonable probability of the ultimate resolution of those questions in their favor.

There appears to be ample authority in support of plaintiffs' contention that the contracts in controversy fall within the scope of the Act although there is no vendor-vendee relationship between the parties to the contracts and plaintiffs are exclusive distributors rather than the outright owners of the trade-marks or brand names for which protection is sought. In General Electric Co. v. Kimball Jewelers, 333 Mass. 665, 132 N.E.2d 652 (1956), the Supreme Judicial Court of Massachusetts held that the provisions of the Massachusetts Act identical to those of the Illinois Act now under consideration permitted a producer to enter into a fair trade contract with a retailer, although the producer traded only with wholesalers who in turn supplied retailers with the merchandise in



question. There the court said (132 N.E.2d at 655):

"The contract gives the dealer the benefit of the price support afforded by General Electric's price lists--not only the one attached to the contract but any subsequent ones while the contract is in effect. The furnishing of a current price list is the mainspring that continues the operation of the scheme. See *Doyle v. Dixon*, 97 Mass. 208, 213; *Wit v. Commercial Hotel Co.*, 253 Mass. 564, 572-573, 149 N.E. 609. It was held in *Chandler, Gardner & Williams, Inc., v. Reynolds*, 250 Mass. 309, 145 N.E. 476, which was a suit in equity to enforce the restrictive provisions of a contract of employment where the employer reserved to itself the exclusive privilege of discharging the employee, that the contract of employment did not lack consideration. It has been settled that contracts similar to the one introduced in evidence in this case are supported by sufficient consideration. *Houbigant Sales Corp. v. Woods Cut Rate Store*, 123 N. J. Eq. 40, 43-44, 47-48, 196 A. 683; *General Electric Co. v. Masters, Inc.*, 307 N. Y. 229, 120 N.E.2d 802, appeal dismissed sub nomine *Masters, Inc. v. General Electric Co.*, 348 U. S. 892, 75 S. Ct. 215, 99 L. Ed. 701; *General Electric Co. v. S. Klein-on-the-Square, Inc.*, Sup., 121 N. Y.S.2d 37; *Seagram Distillers Co. v. Corenswet, Tenn.*, 281 S.W.2d 657, 661. *Williston, Contracts* (Rev. ed.) s. 102. The execution of the contract by the dealer might well have been thought to be a benefit to him, otherwise he would not have signed it. He might well have thought that the making of the contract would tend to free him from cut rate competition, or ~~lessen~~ the competition, in one branch of his business and that the more signers the plaintiff secured in the trade area served by the dealer the better it would be for the dealer. The dealer executed the contract freely and voluntarily and secured for his own benefit the establishment of a fair trade program."

And in *Norman M. Morris Corporation v. Hess Brothers, Inc.*, 243 F.2d 274 (3rd Cir. 1957), the Court of Appeals for the Third Circuit held that an exclusive distributor for the entire United States could enter into valid fair trade contracts with retailers in Pennsylvania. The court noted that the Pennsylvania Act, like the Illinois Act, designates the party who may stipulate resale prices only as "vendor." There the court found support in decisions by the courts of New York, New Jersey and California, but relied particularly on the opinions of the United States Supreme Court



and the Illinois Supreme Court in the Old Dearborn and Triner cases, emphasizing that in those cases a distributor and not the producer or owner of the trade-mark had stipulated the resale price.

In General Electric Co. v. Kimball Jewelers, supra, the Massachusetts court also held that there was sufficient consideration to support the contract. On this point the court reasoned as follows (132 N.E.2d 656):

"A fair trade contract may be made between a producer and a retailer who do not trade directly with each other. The statute applies not only to contracts between the parties, but to any contract 'relating to the sale or resale of a commodity', whether the sale is between the parties or not, because the object is to protect the trade mark, brand or name of the producer or owner, whoever makes the sale. General Electric Co. v. Masters, Inc., 307 N. Y. 229, 120 N.E.2d 802, appeal dismissed sub nomine Masters, Inc. v. General Electric Co., 348 U. S. 892, 75 S. Ct. 215, 99 L. Ed. 701; General Electric Co. v. Sabreen, D. C., 128 F. Supp. 900. Seagram Distillers Co. v. Corenswet, Tenn., 281 S.W.2d 657."

The contracts in the instant case provide that the "owner" reserves the right to change the schedule of prices from time to time upon five days' written notice to the retailer.

We believe that the foregoing cases and the cases cited therein give the plaintiffs a tenable position which justified the issuance of the temporary injunctions by the trial court.

We decline to pass on the constitutional question raised by defendants. This court has jurisdiction on an interlocutory appeal to review constitutional questions. People v. Kostaken, 10 Ill.2d 549, 550 (1957); Webb v. Marozas, 268 Ill. App. 338 (1932); Klever Shampay Karpel Kleaners, Inc. v. City of Chicago, 238 Ill. App. 291 (1925). However, we do not believe that the trial court in issuing the temporary orders passed on any constitutional defense which might be available to defendants in a trial on the merits.

Orders affirmed.

McCormick, P. J., and Schwartz, J., concur.



464  
47473

DURALLIUM PRODUCTS CORPORATION,  
an Illinois corporation,

Appellee,

v.

LORDELL CORPORATION, an  
Illinois corporation,

Appellant.

APPEAL FROM SUPERIOR  
COURT, COOK COUNTY.

19 I.A.<sup>21</sup> 576

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a summary judgment declaring that a contract for the purchase of 500 machines was void as to all except 100 of them. While other grounds are urged upon us, we need consider only the question vital to all summary judgments of this character, that is, was there a "genuine issue as to any material fact." (Practice Act (Ill. Rev. Stat. 1957, ch. 110, par. 57); Allen v. Meyer, 14 Ill.2d 284.) The Supreme court in the case cited states that the use in a proper case of summary judgment procedure should be encouraged. That is and has been the understanding of this court, but the instant case is far from being one in which such procedure is proper.

Plaintiff gave defendant an order for 500 Duramold Dispensers at \$70 each and then provided: "Release 100 at once. Balance on our written notice." The acceptance of the order is not disputed. On its face it constitutes a contract for 500 machines at the price specified. In the absence of a specific date for delivery or shipment, the law implies a reasonable time. Sanborn v. Benedict, 78 Ill. 309 (1875) (buyer said he would notify seller when he would call for goods);





Lehigh Valley Coal Co. v. Curtis, 22 Ill. App. 394 (1886) (goods were to be "delivered as ordered" by buyer); Earl Mfg. Co. v. Summit Lumber Co., 125 Ill. App. 391 (1906) and Tupman Thurlow Co., Inc., v. Cook, 342 Ill. App. 344 (1951) (no time specified for delivery); Doehler Die Casting Co. v. Correct Measure Co., 307 Pa. 187, 160 A. 772 (1932) (goods were "to be shipped as specified"); Surplus Properties Corp. v. United States, 100 F. Supp. 939 (1951) (seller was to "hold for shipping instructions"). See, also, 2 Williston on Sales, Sec. 451 (Rev. Ed. 1948); I.L.P. Sales Sec. 82. Plaintiff seeks by parol evidence presented by affidavit and deposition to prove that the true meaning of the contract is that the order was binding only as to 100 machines, and that the balance was subject to its optional order from time to time. Here there is a sharp conflict.

Perbohner, vice-president of plaintiff company, in his affidavit says that the figure 500 represented only its estimate of the number of units which would eventually be sold; that he told Wellman, president of defendant company, that plaintiff would not obligate itself to purchase more than 100 units; that Wellman advised him he could not get the lowest price from his suppliers on an order for 100 units; that such a small order would not give him the prestige necessary to obtain credit, and suggested that plaintiff's order reflect the possibility that 500 Duramold Dispenser units might eventually be ordered, manufactured and sold, and thereby assist him with his suppliers; that plaintiff accepted the suggestion and thereby it was agreed that only 100 such units would be manufactured, and additional



orders would be given if, as and when affiant felt that more than 100 dispenser units could be sold. Perbohner testified that to confirm the understanding a letter was prepared which was signed by both parties. That letter referred to the purchase order of March 13, 1952, and then stated: "We [plaintiff] wish to have it understood that the 100 are to be immediately released, but further shipments are to be made on our written order only." The substance of Perbohner's testimony is denied by Wellman in his affidavit of defense and in his discovery deposition. He states that the figure 500 was the number to be manufactured and sold. His denial is explicit and definite. The issue of fact is a sharp one. The letter of March 19, 1952, from which we have quoted, does not on its face support plaintiff's position. It is true that there are certain facts in the affidavit and deposition from which plaintiff was entitled to draw inferences favorable to its side, but they are far from conclusive of the issues.

The judgment is reversed and the cause is remanded with directions to deny the motion for summary judgment, and to set the case for trial.

Judgment reversed and cause  
remanded with directions.

McCormick, P. J., and Robson, J., concur.

Abstract only.



470  
47538

GLORIA HARRIS, Administrator of the  
Estate of WILLIAM HARDAWAY, Deceased,

Appellant,

v.

AETNA INSURANCE COMPANY, Inc.,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

19 I.A. 577<sup>2d</sup>

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

This is an appeal which seeks to obtain construction  
by this court of certain language in certain insurance policies.

A motion to dismiss an amended statement of claim was  
filed by defendant. The order entered by the court after an  
argument on the motion to dismiss is as follows:

"ORDER

This cause coming on for hearing, on motion of defendant hereto-  
fore entered March 5, 1958, to strike Amended Statement of Claim,  
and the Court being fully advised in the premises, sustained said  
motion and thereupon it is ordered by the Court that the Amended  
Statement of Claim be and the same is hereby stricken."

It is a primary rule that the court speaks by its order.  
This order does not dismiss the cause of action. It strikes an  
amended statement of claim. The cause of action is therefore still  
pending in the lower court. Ill. Rev. Stat., Chapter 110, §77,  
provides that appeals will lie to review final judgments, orders,  
or decrees. An order of court which leaves the cause still  
pending in the lower court is not appealable.



In the case of Aetna Plywood & Veneer Co. v. Robineau, 336 Ill. App. 339, an order below which dismissed the complaint on the ground that the complaint was substantially insufficient at law and did not ~~set~~<sup>put</sup> up a cause of action was held not a final order. This court cited at great length the decision of Mr. Justice Cartwright in Chicago Portrait Co. v. Chicago Crayon Co., 217 Ill. 200, where in a case involving a demurrer the court sustained the demurrer and dismissed the suit, which was held not to be a final order. From the discussion of the problem in the Aetna Plywood case, supra, it is clear that the order entered by the court below in this proceeding was not final. This court does not have jurisdiction. The appeal will be dismissed.

APPEAL DISMISSED.

FRIEND, P. J., and BURKE, J., CONCUR.

ABSTRACT ONLY.





47534

FRANCES CIRIGNANI,

Plaintiff - Appellee,

v.

ABERNATHY CAB COMPANY, an Illinois  
corporation, a/k/a ALERT CAB COMPANY,

Defendant - Appellant,

BURKE E. BRADNER,

Defendant - Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

19 I.A. 577<sup>2</sup>

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action, with verdict and judgment for plaintiff against both defendants for \$1500. The Abernathy Cab Company, after judgment, moved to strike the words "a/k/a Alert Cab Company" from the verdict. The trial court denied the motion and the only question before us on appeal is the correctness of this ruling.

In the record before us on appeal, however, there is no report of the proceedings below. We therefore have no basis upon which we can determine whether or not there was evidence submitted which would justify inclusion of the words "a/k/a Alert Cab Company," and therefore we must presume that there was testimony sufficient to uphold the ruling of the trial court, Shoup v. Alexander Motor Garage Co., 333 Ill. App. 46. See Lukas v. Lukas, 381 Ill. 429, and Knecht v. Sincox, 376 Ill. 586.

Appellant contends that Rule 2, section 25 (3) of the Civil Practice Rules of the Municipal Court of Chicago applies here. That rule pertains to the joinder of "new parties," and is not applicable here since in presuming that the order of the court below was justified by the evidence we must necessarily presume that Alert Cab Company was not a "new party." The order is affirmed.

AFFIRMED.

LEWE, P.J. AND MURPHY, J., CONCUR.

ABSTRACT ONLY.



482

A

47455

TONY RISTEN, Administrator of the  
Estate of JOSEPH RISTEN, Deceased,  
and THERESA RISTEN,

Appellees,

v.

CHICAGO TRANSIT AUTHORITY, a Municipal  
Corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

19 I.A.<sup>2d</sup> 578

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action with verdict and judgment for both plaintiffs. Defendant seeks a new trial, contending that the verdict is against the manifest weight of the evidence, and that the court erred in refusing an instruction.

An automobile, being driven east on 79th Street by plaintiff, Theresa Risten, collided with a northbound Stony Island Avenue CTA bus, at about 6:00 P.M. on October 21, 1952, in the intersection of three heavily traveled Chicago streets--79th Street, Stony Island Avenue and South Chicago Avenue. Both Theresa Risten and Joseph Risten, her father-in-law, passenger in the car, were injured. He died from other causes before trial. 79th Street is a 100-foot paved highway, running east and west. Stony Island Avenue is approximately 300 feet wide, and runs north and south, and has ten traffic lanes--six north and four south. South Chicago Avenue runs northwest and southeast and, at an angle, intersects Stony Island and 79th Street at their intersection. There are traffic control lights at the intersection. The weather was good, the pavement dry, and it was still daylight.



Defendant contends that the manifest weight of the evidence shows that the accident was caused by the negligence of Theresa Risten, and that the bus driver was not negligent.

The principal facts in dispute are: (1) Whether Theresa entered the intersection on the green light; (2) Who hit whom?; and (3) Was the bus in motion at the time of impact?

The four occurrence witnesses were: (for plaintiff) a traffic policeman on duty at the intersection; Theresa Risten; (for defendant) the bus driver; and a bus passenger.

Theresa testified she had stopped, before entering Stony Island, for a red traffic light, controlling eastbound 79th Street traffic. There were two or three other cars ahead of her, and on the green light she followed the other cars east into the intersection. She intended going southeast on South Chicago Avenue, and as she started to turn to so proceed, the left front fender of the bus struck the left front fender of her car. The bus was in motion at the time of impact. She saw the traffic officer on the south part of 79th Street, stopping northbound Stony Island Avenue traffic with his right hand, and he had his left hand up in the air, standing still. " \* \* \* this bus came out and struck me in the front. The only time I seen the bus was when he came and hit me. When I first saw the bus, it was about five feet away from me."

The traffic officer testified he was the only police officer in charge of the intersection at that time, and that traffic was heavy. He was stationed just south of 79th and in the middle of Stony Island Avenue. He noticed the Risten car



approaching, going east, and tooted his whistle and held out his hand to try and stop the northbound traffic, "figuring that the party would not get through. I held up the northbound traffic on my right, on Stony. There is about five or six lanes of traffic there. \* \* \* And the bus--they were waiting and it seems they just come together. The car going east was in motion at the time of impact; but the bus--I think they were held up; I am not positive of that. I could not say whether the bus was in motion or stopped at the moment of impact. \* \* \* The bus was right by the curb of Stony Island, the right-hand curb going north."

The bus driver testified that he stopped 15 feet south of where South Chicago and Stony Island meet and took on four passengers. The light was red for the northbound Stony Island traffic, and when the light turned green, "I looked around to see if there was any traffic coming from any direction. I could not see nobody, so I proceeded across the street. I had traveled about thirty feet. I was in the middle of South Chicago Ave., when I noticed a car coming to the left of me. \* \* \* I stopped my bus immediately. And just about that time--maybe about one second from the time I had the bus stopped, she ran into the side of the bus. \* \* \* I did not see him (police officer) before the accident."

The bus passenger had boarded the bus at 79th and Stony Island. She testified the bus entered the intersection on the green light. She saw the Risten automobile when it was "approximately half way between the west side of Stony Island





and the east side. It was in motion. When I first observed the automobile, the front end of the bus was about half way across South Chicago Ave. As to what was the next thing that happened, the bus driver must have seen it too, because he slammed on the brakes and stopped the bus. \* \* \* The bus was standing when the automobile came in contact with it."

In order for a verdict to be contrary to the manifest weight of the evidence, where the evidence is conflicting, as in the instant case, an opposite conclusion must be clearly evident. (Griggas v. Clauson, 6 Ill. App.2d 412, 419.) It is not the province of this court to disturb the verdicts of juries on questions of fact, unless they are clearly and palpably erroneous. Thomas v. Smith, 11 Ill. App.2d 310.

In examining the evidence, we find no one who controverted Theresa Risten's testimony that she entered the intersection on the green light. The traffic officer stopped the northbound Stony Island traffic to permit her to get through, in order to prevent an accident, but he did not say that she entered the intersection on a red light, nor was he questioned about it by either side. The jury, reasonably, could have inferred that if she had violated the red light, the traffic officer would have mentioned it in his testimony, because he must have been watching her from the time she entered the intersection, as, because of her, he held up the northbound traffic.

The bus driver, before proceeding on his green light, looked to see if there was any traffic "coming from any direction," but failed to see the traffic officer who was ahead of him on his



left. He traveled 30 feet into the intersection, when he noticed a car coming from his left and going east. The bus passenger first observed the Risten car when it was about half way between the west and east sides of Stony Island Avenue. Neither she nor the bus driver gave any testimony about east and west traffic lights. We believe the jury could easily have decided that Theresa Risten entered the intersection on the green light.

As to the physical fact of "who hit whom," and as to whether or not the bus was in motion at the time of impact, Theresa Risten testified that both vehicles were in motion and the bus hit her. The bus driver testified he had stopped for about one second and the Risten car ran into the side of the bus. The traffic officer was interrogated extensively on both points and could not say whether the bus was in motion or stopped at the moment of impact, "and it seems they just come together." The bus passenger said the bus was stopped when the automobile came in contact with it. Therefore, as to these two controverted points, we have one disinterested witness supporting defendant's theory, i.e., that the bus was hit while stopped, and one disinterested witness watching the entire occurrence, who could not sustain it.

We agree with defendant's contention that the number of credible disinterested witnesses and the physical facts are important in passing on the weight of the evidence and, in proper cases, can be controlling, but we do not believe they are controlling factors in this case.



It is a common-day occurrence in congested areas to see vehicles enter an intersection on a green light and, because of heavy traffic conditions, be unable to traverse the intersection before the traffic lights change the flow of traffic. The intersection in question is unusually large and complicated, and the jury could have believed that Theresa Risten started east to cross Stony Island on the green light, and under heavy traffic conditions had not reached a distance sufficient for her to turn southeast into South Chicago Avenue when the north and south traffic light turned green. The bus driver was in the tenth and last lane which she would have to cross. Five of the six north-bound lanes had obeyed the traffic policeman's signal. The jury may have found it difficult to believe the bus driver did not see the signals of the traffic officer. The jury might have concluded that the bus driver was negligent in proceeding into the intersection when the intersection was not yet clear of east and west traffic, even though he had the green light, and that Theresa Risten was not negligent in entering the intersection on a green light, with a traffic officer on duty, whose signals were not obeyed by the bus driver. We do not believe this to be a case in which an opposite conclusion to that of the jury is clearly evident. Therefore, the verdict is not against the manifest weight of the evidence.

Defendant contends that it was error for the court to refuse its instruction No. 1, which purported to state defendant's theory of the case, as based upon the evidence. We have examined the instruction and find that it contains a statement not based



on the evidence, particularly, " \* \* \* she has no right, as a matter of law, when she sees a green light ahead to approach the intersection and without reducing speed, proceed through it in an attempt, to beat the light."

The only testimony on this phase of the case was by Theresa Risten, which was that she had stopped for a Stony Island Avenue red light, waited until it changed to green, and then proceeded to cross. There was no testimony tending to prove that she tried to beat the light or that she approached and proceeded through the intersection without reducing speed. No other witness gave any testimony as to the color of the traffic light or her speed on entering the intersection. We believe the court did not commit error in refusing the instruction. We have examined all of the instructions given the jury and believe it was properly instructed.

For the reasons given, the judgment is affirmed.

AFFIRMED.

LEWE, P.J., AND KILEY, J., CONCUR.

ABSTRACT ONLY.





STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

General No. 10201

Agenda 1

|                                  |   |                 |
|----------------------------------|---|-----------------|
| People of the State of Illinois, | ) |                 |
|                                  | ) |                 |
| Plaintiff-Defendant in Error,    | ) |                 |
|                                  | ) | Error to County |
| vs.                              | ) | Court of        |
|                                  | ) | Sangamon County |
| Alfred Denniss,                  | ) |                 |
|                                  | ) |                 |
| Defendant-Plaintiff in Error.    | ) |                 |

Roeth, F.J.

191. A. 570

Plaintiff in error was convicted by a jury of operating a motor vehicle while under the influence of intoxicating liquor. He filed a post trial motion to set aside the verdict or in the alternative for a new trial. This motion was denied by the trial court and plaintiff in error has sued out this writ of error to review the judgment of the trial court.

The only specific ground to set aside the verdict or in the alternative for a new trial, assigned in the post trial motion, is that the court erred in giving People's instruction No. 4. Likewise, in this court this is the only error assigned and argued. However, the abstract reveals that a number of other instructions were given on behalf of the People. Also instructions were given on behalf of plaintiff in error. With the exception of People's instruction No. 4, no other instructions are set forth in the

Abstract

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

Page 1

General No. 10201

People of the State of Illinois,

Plaintiff-Defendant in Error,

vs.

Alfred Dennis,

Defendant-Plaintiff in Error.

Filed for  
Court of  
Appeals

Booth, P. J.

Plaintiff in error was convicted by a jury of operating a motor vehicle while under the influence of intoxicating liquor. He filed a post trial motion to set aside the verdict on the alternative for a new trial. This motion was denied by the trial court and plaintiff in error has since this time failed to review the findings of the trial court. The only specific ground for setting aside the verdict or in the alternative for a new trial, assigned in the post trial motion, is that the court erred in giving Instruction No. 4. Likewise, in this court this is the only error assigned and argued. However, the abstract reveals that a number of other instructions were given on behalf of the People. Also instructions were given on behalf of plaintiff in error. With the exception of People's Instruction No. 4, no other instructions are set forth in the

abstract of plaintiff in error.

It is the well established rule, that error cannot be predicated upon the giving, refusal, or modification of certain instructions unless all instructions which were given and tendered are completely set forth in the abstract and unless the abstract shows who offered the instructions concerning which error is assigned. People vs. Bybee, 9 Ill. 2d 214, 137 N.E. 2d 251; People vs. Vickers, 326 Ill. 290, 157 N.E. 205.

Accordingly the judgment of the County Court of Sangamon County is affirmed.

Affirmed.

Reynolds, J., and Carroll, J., concur.

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19 Ill. App. 2nd

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